United States
COURT OF APPEALS
for the Ninth Circuit

SODERHAMN MACHINE MANUFACTURING COMPANY, INCORPORATED,

Appellant,

v.

THE MARTIN BROS. TIMBER & CONTAINER COMPANY, INCORPORATED,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE WILLIAM G. EAST, Judge

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment rendered in the United States District Court for the District of Oregon by the Honorable William G. East, sitting without a jury, awarding defendant damages on its counterclaim in an action on a contract begun by plaintiff. The jurisdiction of the District Court rests upon the amount in controversy and diversity of citizenship (R. 1, 4, 9), 28 U.S.C. § 1332. Jurisdiction of this Court exists under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This is an appeal from a judgment awarding defendant damages on its counterclaim in an action initiated by plaintiff to recover the unpaid balance on a contract to construct and install a log debarking and chipping installation (R. 99). The action was originally filed to recover $61,395, plus interest (R. 11). Respondent counterclaimed that appellant had failed to complete the installation in certain respects, that the designing and installing of the system in other respects was insufficient and defective, that respondent had been compelled thereby to redesign and reinstall some units and to complete installation of other units, and that some of the units supplied did not meet the specifications and requirements of the contract (R. 13-21).

Appellant, Soderhamn Machine Manufacturing Company (hereinafter called Soderhamn), is an Alabama corporation engaged in the manufacture and sale of heavy equipment used in the wood products industry (R. 9).

Respondent, The Martin Bros. Container & Timber Products Corporation (hereinafter called Martin), is an Ohio corporation engaged in the milling, manufacturing and selling of various wood products (R. 9). Among its numerous operations was a lumber and plywood manufacturing plant at Oakland, Oregon. In 1961 Martin decided to install equipment to debark logs and to increase its capacity to manufacture wood chips, mainly for sale to paper manufacturers (Tr. 1017-1018). It received three proposals, including one by McManama and Company, Inc., which was a contractor experienced in the installation of the required

equipment. McManama's proposal was based on Soderhamn products as the principal items of equipment. Martin was unwilling to contract with McManama (Tr. 627), so Soderhamn prepared and submitted a proposal on its own behalf (Ex. 919).

After negotiations and some changes in the proposal, an agreement was reached on July 21, 1961, which together with a letter of August 11, 1961, was accepted by Martin and became the contract between the parties (Ex. 100). The only significant difference between the proposal and the contract was a provision that the barker system would "be mounted on steel piling, steel caps and with steel cross-bracing" instead of wood (Tr. 629; Ex. 100, p. 27). During the execution of the work there were 19 change orders executed by Martin, which resulted in a final contract price of $484,582.40 (Exs. 101-119, R. 10). The letter of August 11, above referred to as part of the contract:

1) Designated R. L. Kemp as Martin's representative with authority to determine changes in work or design, to accept charges not covered by the contract and to agree to delays;

2) Designated McManama & Co. as Soderhamn's subcontractor;

3) Provided for an all-risk insurance policy in lieu of a contractor's policy;

4) Provided for a policy on the life of Gerald McManama, president of McManama and Co., "in lieu of a performance bond"; and

5) Disclaimed any liability of Soderhamn for delays in completing the installation.

The contract was in four parts: Part I contained the general terms; part II described the principal units of equipment to be installed; part III described the installation of the principal units and included the necessary auxiliary components; part IV was a summary.

Parts II and III were divided into "phases." Phase I covered a "veneer core chipping system," which included the equipment to receive and chip peeler cores from existing plywood mill lathes and to convey the chips to an existing carloading station, with provision for later hooking the pneumatic system into a combined sawmill and veneer chip conveyor in Phase IV. Phase II covered the log barker system, including a 60″ Soderhamn debarker "to be installed as shown" on Exhibit 122, which was the only drawing in existence at the time of the contract (Tr. 48). (This drawing consists of a map showing the general layout of existing facilities at the plant and a schematic showing the debarker structure and system, including drawings of the structures and basic measurements and locations of the principal units.) This phase also included infeed and outfeed log conveyors, transfer decks, cutoff saws and three bark conveyors to transfer refuse from the debarking and sawing operations to a hammer hog which was to be installed and which was located on the schematic and described.

Phase III encompassed the sawmill chipper and chip loading system, comprising a "shaker roll" at the end of an existing sawmill refuse conveyor, a conveyor to a new chipper, a conveyor to a surge bin for sawmill and veneer chips and a pneumatic conveying system to move screened chips from the surge bin to be loaded into railroad cars. Phase IV provided for modification of the core chip pneumatic conveyor and

the veneer chip pneumatic conveyor system described in Phases I and III to form a single conveyor with double injection of chips. Phase V was to be a fuel bin, but this was eliminated by Change Order 19 (Ex. 119). The final contract was essentially the same as McManama and Co.'s proposal of May 10 (Ex. 10). The pneumatic conveyor components were the same as in proposals made to Martin by other bidders (Tr. 1570). McManama had had its crew on the job by late July or August 1961. The first work undertaken was the driving of piles required for structures in the various phases (Tr. 632). Construction of Phase I (the core chipper) was then carried out. This component was completed and accepted by Martin on Kemp's recommendation in March, 1962 (Tr. 708).

Early in its operation the chipper was accidentally seriously damaged when a piece of steel from a mill lathe fed into it. The insurance covered the loss and a new chipper was installed by Soderhamn. Part of defendant's original claims related to this reinstallation and part related to the pneumatic conveyor away from this chipper.

The phases were not installed in order (Tr. 1340). Soderhamn had never before made a 60″ barker (but it had sold several smaller barkers which McManama had installed in western plants, some of which had been inspected by Martin's representative Kemp before the contract was signed). (Ex. 904, Tr. 17-20). The barker was fabricated and assembled at the Kenton Machine Works in Portland (Tr. 77). In the meanwhile Martin was interested in increasing chip production from its existing facilities, so Phase III (the sawmill chipper) was next to be built (Tr. 1340). There was already a sawmill refuse conveyor which emptied into a conveyor to a burner at a 15-20°

angle (Tr. 1345-46). The proposal called for a "shaker roll" over which sawmill refuse would pass; the rolls would shake off sawdust and permit small unchippable blocks and other undesirable materials to drop through to the burner conveyor.

From the rolls chippable material was to be conveyed to a chipper, thence into a pneumatic conveyor, which under Phase IV was to be part of the double injection system to convey core and sawmill chips to be loaded in railroad cars. This installation was completed in January 1962 and Phases I and IV were paid for in April 1962 (Tr. 708). Part of defendant's claims related to alleged inadequacies in the shaker rolls, part to alleged deficiencies in the chipper and part to alleged inadequacies in the Phase IV pneumatic conveyor system (R. 18, 19).

Phase II (the barker) was the last to be installed. The log haul was installed on the piling earlier put in, followed by the infeed and outfeed conveyors, the transfer decks, the saw deck, the saws and, finally, the 60″ barker. The barker was first placed into operation in June, 1962. During this phase there developed substantial disagreements over contract requirements, and some of defendant's claims are based on these disagreements. After completion its operation gave rise to numerous problems, dissatisfactions and complaints on which some others of defendant's claims are based (R. 13-17). After McManama left the job in September, 1962, Martin undertook substantial repairs, additions and alterations in and to the system as installed, upon which it based some of its claims.

At various times during the construction Martin revised its requirements, relocated components from the places shown in Exhibit 122, made demands for

equipment or structures not expressed in Exhibit 100 and entered into numerous separate agreements with McManama for things not mentioned in the contract. Some of defendant's claims are based on these elements as they relate to the various phases. Beginning in February 1963, 7½ months after its installation, the barker's bearing system failed six times and was repaired by Soderhamn without charge to Martin (Tr. 79-80). In August Martin shut down the barker, allegedly because of a seventh bearing failure, and demanded that Soderhamn take the machine back (Ex. 781). In November, 1963, after the initiation of this litigation, Soderhamn removed the barker pursuant to stipulation that it could be so removed without prejudice to the rights and contentions of either party (R. 10), and it was resold.

Plaintiff's complaint was filed in April, 1963. The demand was for the unpaid balance or, alternatively, in *quantum meruit* for the value of the performance less the amount paid. Defendant counter-claimed for damages. The Pretrial Order (§ III, Plaintiff's Contentions, R. 11-12) reflected the unpaid balance claim (less the adjustment by reason of resale of the barker), and the alternative claim for the reasonable value of materials, work and labor furnished under the contract.

On defendant's counter-claim the Pretrial Order (§ IV, Defendant's Contentions, R. 13-21) detailed the claimed defects and deficiencies under some 19 headings summarized as follows:

1. The barker foundation was so constructed that it vibrated excessively, so that defendant had to have it gusseted, rewelded and braced.

2. The log haul chain would not stay on its sprock-

ets and the chain return slides were inadequate, so that defendant had to redesign the haul, install a chain tensioning device and put in adequate slides.

3. A. "Kicker shafts" to actuate devices on the barker structure had to be replaced.

3. B. Additional bearings on the shafts had to be installed.

3. C. "Kicker arms" were too light and had to be replaced with heavier material.

3. D. Defendant expended money to secure the installation of a steel transfer deck, as allegedly required by the contract, over and above the cost of the wood deck proposed by plaintiff.

3. E. Defendant failed to install concrete or steel pits under the hog, its surge bin and feeder.

4. Defendant had to replace steel plating on "knees" installed to guide logs from the barker outfeed conveyor and saw deck into the pond.

5. The refuse conveyors under the barker were insufficient in number and location, so that defendant had to install two additional conveyors.

6. A. Plaintiff failed to install sufficient "shrouding" to direct saw deck refuse to the conveyors underneath.

6. B. Defendant had to install two additional log lifts for the saws and install additional lift guides for all saws.

6. C. The sinker deck transfer chain drive interfered with lift truck operation and had to be relocated.

6. D. Defendant had to pay for installation of a roof over the sawing equipment.

7. The hydraulic system had to be substantially repaired.

8. The barker specifications of the contract were not met, and the barker was defective in that it would not provide variable tension on the chisel saws, the ring bearings were insufficient to permit sustained operation of the barker and the barker would not completely debark large logs; and frequent failures resulted in down time and attempted repairs. (Damages claimed under this head included expenses of installation, operation and removal for repair, removing, rebuilding and replacing the bark structure, extra labor, and replacement of the barker with a different machine).

9. The barker control console had to be relocated.

10. The refuse conveyor to the hog had to be redesigned and reinstalled.

11. Plaintiff failed to paint the pneumatic conveyor pipe.

12. A. Defendant had to supply a sawmill refuse slasher saw as part of the sawmill chipper system.

12. B. To make the sawmill refuse chipper system operable (including the shaker roll) it had to be redesigned and installed.

13. Plaintiff failed to install a sawmill chipper of the size required by the contract, which necessitated a new machine being installed.

14. A roof had to be installed over the conveyor from the sawmill chipper to the loading bins.

15. The dual injection pneumatic chip conveyor was of inadequate capacity to handle the chip production.

16. Plaintiff failed to install brushes to clean the bark and chip conveyor belts and chains.

17. Defendant expended money to secure the installation of steel decks and walkways on the barker structure, as allegedly called for in the contract, over and above the cost of the use of wood proposed by plaintiff.

18. Miscellaneous materials, machinery, labor, and insurance were furnished by defendant in connection with installation and construction required to be done by the plaintiff.

19. Defendant suffered a loss of profits expected to be derived from the sale of chips.

In each instance a specific dollar amount was asserted.

The Pretrial Order (§ V, R. 22) set out 16 issues of fact and law.

The matter came on for trial before Judge William B. East, sitting without a jury, and was tried over a period of 9 trial days (R. 110). More than 700 exhibits comprising more than 1200 items were received. Thereafter the matter was taken under advisement, and briefs were submitted by the parties.

On April 8, 1967, Judge East issued a memorandum opinion (R. 53-54) in which he: 1) refused "to review the evidence in this opinion"; 2) concluded that "the defendant has made a better case for its contentions"; 3) reduced the questions in the case to three: "1) 'Whether the contract, fairly and reasonably construed, under the usual rules of construction, required Soderhamn to make certain installations as the part of a complete log debarker-chipping system.' "; "2) 'Whether Soderhamn failed to perform

the contract as to certain items provided for therein . . .' "; and "3) '. . . the sufficiency and workability or insufficiency of certain items' " and 4) ignored the detailed questions of law and fact in the Pretrial Order.

Thereafter defendant submitted Proposed Findings of Fact and Conclusions of Law which differed from its Pretrial Contentions as follows (numbered by defendant's contention numbers):

6. A. Amount claimed reduced from $2,975.47 to $1,917.06.

6. B. Amount claimed reduced from $9,563.54 to $7,395.66.

(These reductions reflect elimination of claims for replacement of certain decking ordered by Kemp from McManama, a bearing replaced in maintenance, and one of the log lifts allegedly required to be and not supplied under the contract.)

6. D. Amount claimed reduced from $2,534.59 to $1,161 by abandonment of defendant's claim that plaintiff was liable for extension of the saw deck ordered by Martin.

7. Amount claimed reduced from $2,915.06 to $2,130.76 by elimination of claim for oil purchased in 1963, after the alleged deficiencies had been corrected.

8. Amount claimed reduced from $97,500, the alleged amount to replace the Soderhamn barker with a comparable size barker of a different manufacturer to $81,500, the contract price of the Soderhamn unit. This reduction reflects a theory that in effect Soderhamn never supplied a barker under the contract.

12. A. A $2,900 claim for a slasher saw in the mill under the contract was abandoned.

12. B. Amount claimed reduced from $10,287.74 to $9,531.57 by elimination of charges admittedly not covered by the contract.

13. Amount claimed reduced from $18,035 to $800 by abandonment of a claim that plaintiff failed to perform and recognition that the contract was modified by the parties with respect to this item of machinery.

18. All claims abandoned except 18 E, for insurance, which was reduced slightly.

19. Claim for loss of revenue abandoned.

Defendant thus abandoned claims totaling about $84,000.

Plaintiff filed its Objections to the proposed Findings of Fact and Conclusions of Law (but conceded Findings of Fact numbers 11 and 13, and conclusions of law number 1, and $218.40 of conclusion of law number 2 (R. 73-74)) and requested additional and different Findings of Fact and Conclusions of Law (R. 55-74), to which defendant filed Objections (R. 76-78). Thereafter plaintiff moved for a hearing on its objections (R. 80). The motion was summarily denied on June 27, 1967 (R. 83). On June 29, 1967, Judge East signed the Findings of Fact and Conclusions of Law submitted by the defendant and entered judgment for defendant on its counterclaim, including interest from January 1, 1964, and costs.

Plaintiff timely filed Notice of Appeal to this Court and duly perfected this appeal.

SPECIFICATIONS OF ERROR

1. The trial court erred in making Findings of Fact 1 through 10, 12, and 14 through 18 inclusive, in § II of its Findings of Fact and Conclusions of Law (R. 86-93) in that they, and each of them, are clearly erroneous, because they are contrary to law, against the weight of the evidence and not supported by the record.

2. The trial court erred in making Conclusions of Law 2 through 6 (except that portion of Conclusion of Law 2 allowing defendant $218.40, R. 94, line 1) for the reason that they, and each of them, depend upon Findings of Fact which are clearly erroneous.

3. The trial court erred in entering judgment against appellant based on erroneous Findings of Fact and Conclusions of Law.

4. The trial court erred in including in its judgment any allowance for interest, for the reasons that defendant was not entitled to interest as a matter of law, and that defendant in its demand for relief did not demand interest.

5. The trial court erred in failing to allow plaintiff's motion to strike the testimony of the witness Ray Martin:

> "MR. DUNN: . . . While Mr. Martin is on the stand, I would like to make another motion.
>
> * * * * *
>
> That all of Mr. Martin's testimony which he has given from the stand pertaining to the amount expended for these various modifications and various repairs and his testimony to the fact that such expenditures were reasonable be stricken from the record, because he testified that he had

no independent knowledge, that he was testifying from Exhibit 929. . . . (Tr. 1259)

THE COURT: I will deny your motion." (Tr. 1261)

Mr. Martin's testimony (Tr. 845-1255) in support of damages was based on time cards, invoices and other things contained in Exhibit 929 and concerned matters about which he had no direct personal knowledge except the matters in the exhibit, which he did not prepare. Record references to testimony specifically based on Exhibit 929 by Mr. Martin are as follows:

Tr. 888-889, 892, 895-896, 898-899, 903, 906, 908-911, 911-913, 917-918, 921, 926-927, 950, 963-964, 967, 971, 979-980, 1027-1029.

In each of the cited portions of the transcript Mr. Martin was testifying in support of a specific value in reference to a specific item of claimed damage, based on Ex. 929.

SPECIFICATIONS OF ERROR 1, 2 AND 3 SUMMARY

The trial court adopted as its findings and conclusions herein each and every proposal of the defendant on its counterclaim, but a review of the record, including the transcript and exhibits, demonstrates that (with one minor exception conceded by plaintiff and another which reflected a reduction of damages from more than $18,500 to the amount of $800 conceded by plaintiff) the defendant failed to produce substantial evidence supporting the amounts claimed and allowed. It is apparent that Judge East failed to review the evidence adduced for and against the de-

fendant's contentions, for if he had he could not have made the findings and conclusions which, as specified, are clearly erroneous on the facts and the law. Moreover, the trial court so interpreted and construed the contract as to create a new and different one, imposing on the plaintiff obligations either contrary to the expressed ones in the contract or never contemplated by the parties.

ARGUMENT

Introduction

Judge East made extensive Findings of Fact and Conclusions of Law by adopting without change those proposed by the defendant pursuant to an opinion (R. 53) in which the judge specifically refused to set forth a review of the evidence. It is the burden of this part of the brief that the Findings of Fact were in every instance "clearly erroneous" within the meaning of F.R.C.P. 52 (a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction a mistake has been committed." *United States* v. *United States Gypsum Company*, 333 U.S. 364, 394-395, 68 S. Ct. 525, 92 L. Ed. 746 (1948). The trial court "failed to make a sound survey of or to accord the proper effect to all the cogent facts, ..." *Nee* v. *Linwood Securities Company*, 174 F.2d 434, 435 (8th Cir. 1949). While "courts should be slow to impute to trial courts a disregard of their duties and responsibilities or want of diligence or perspicacity in evaluating . . . the weight of evidence" (*Noland* v. *Buffalo Insurance Company*, 181 F.2d 735, 739 (8th Cir. 1950), the plain, unvarnished and unfortunate truth is that Judge East (with the

transcript and exhibits available to him) did not really make the Findings of Fact and Conclusions of Law herein, but accepted without a sufficient review of the facts or the law the defendant's position, apparently in the belief that there would be an appeal in any event so that what he did would make little or no difference (R. 83).

The Statement of the Case (supra, 2-12) outlines generally the context out of which this appeal arises. But in order better to comprehend the impropriety of the trial court's challenged Findings of Fact and Conclusions of Law it is necessary to understand in greater detail more of the factual background relating to the relationship between the various parties and individuals during the performance of the contract. It would make this brief over long to set forth every jot and tittle, but many of the major points must be stated in detail. In a sense each separate finding is a judgment on a separate lawsuit.

After the contract was finalized and construction begun, there were 19 written changes inspired by Martin (Ex. 101-119); the order of phase completion was altered (Tr. 1340, Ex. 100); and the location of the Jeffrey hog was moved closer to the structure (Tr. 1399, Ex. 122). Soderhamn's subcontractor was used by Martin to make additional changes in the design; for example, Martin employed McManama to extend aprons and shrouding, to install a 4′ addition to the deck behind the saws, to change the location of the core chipper (Tr. 1333), to change the wood frame of the chipper building to steel (Tr. 725), to change the barker building from wood to steel (Tr. 1364), to change wooden decks to steel decks (including tearing out installed wood on the sinker deck), to add walks, to add a roof over the saw deck, to add pits for

the hog, to add a slasher saw in the mill, to add a 55′ conveyor, to add a 51½′ conveyor, to replace the core chipper destroyed by the accident of a chuck being fed into the chipper (Tr. 863, 1366). Some of these were covered in the change orders; others were just ordered by Martin and paid for to McManama. Each was made the basis of an element of the counterclaims. Moreover, Martin procrastinated for six months on deletion of Phase V and allowed the plans to be developed and the work to go forward on this phase before deciding to delete it (Tr. 1359, 1081-84). It paid Soderhamn nothing for this.

Throughout the course of this installation Martin demanded items which were not contained in the contract. The transcript at 902 illustrates how Ray Martin (the defendant's general manager) determined the contract requirements. He had a simple formula: his reading of the contract was controlling, and Soderhamn would be expected to perform or pay.

The sawmill chipper matter is particularly important, even though the original claim has been abandoned by defendant. In its pretrial contentions defendant asserted that plaintiff had failed to install a machine in accordance with the contract and claimed as damages $18,500 on that account. Mr. Martin stuck to this point in his testimony, but after the trial defendant apparently recognized the fact that the parties had modified their contract and defendant had accepted in satisfaction a reduction (offered by plaintiff, Ex. 124) of $800 in price. Still in the face of this, defendant refused to acknowledge acceptance of the machine and used its supposed deficiencies as a reason for refusing to make payments due under the contract (Ex. 506, p. 2), while using the machine to produce chips in the ordinary course of its business.

When all was said and done, defendant acknowledged that $800 was its due (R. 92). Again defendant demanded as part of the contract the installation of a slasher saw in the sawmill at a cost of $2,900 (Pretrial Order, R. 18), and Mr. Martin stuck to this claim in his testimony, even though the contract contained not a single provision calling for any installation in that mill. In the proposed findings and conclusions the claim was finally dropped. These, as well as other claims now dropped (supra, 11-12), demonstrate the difficulties Soderhamn had in performing its contract due to the attitude and actions of Martin.

Soderhamn made concessions that were not called for by the contract in an attempt to satisfy Mr. Martin. It donated a buck saw bar (Tr. 1643). It saved the Martin company $8,000 by donating a complete hydraulic system, eliminating Martin's having to supply the air which would have been necessary and which Martin had agreed to supply (Tr. 1056-1063, 1075; see Ex. 430; see p. 24 *infra*). In addition, Soderhamn paid $800 for a performance bond which was not required by the contract but which Martin demanded (Tr. 1063-65; see *infra*, p. 22). Soderhamn made no charge for the work done on Phase V, which Martin finally deleted (Tr. 1084). The contract also stated that "all work under this proposal is based on an 8-hour day and a 40-hour week" (Ex. 100, p. 3). Soderhamn nonetheless worked its crew overtime in an attempt to complete the job within a reasonable time. An extra log stop was provided without charge (Ex. 421), and Soderhamn provided a free plugging switch on the pneumatic system (Ex. 548).

It is clear that Martin specified, prior to the signing of the contract, the machines wanted. These were, in each instance, installed. It is also clear that

the buildings in which and upon which these machines were to be placed were not fully detailed before construction began. The agreement was that the details would be reduced to drawings and approved by Martin's Mr. Kemp. Martin was initially satisfied to have the buildings constructed similarly to those previously built by the McManama company at other plants and inspected by Martin's representatives (Ex. 904, pp. 17-20). In order to insure the buildings were built to its satisfaction, Martin established its maintenance engineer, Mr. Kemp, as the "owner's representative" to approve plans. Mr. Kemp had seen other installations made by McManama and was an old hand in the sawmill industry. He apparently enjoyed the confidence of Mr. F. J. Martin, Chairman of the Board. When he approved a plan or an installation orally, or in writing, the plan or the installation became the specification which was performed. Mr. Kemp, as the Martins' maintenance engineer, was in authority as the company's representative, spending 80% to 95% of his time overseeing this job (Tr. 700, 1066).

At the time of trial Martin was asserting claims against Soderhamn in excess of $260,000. Regardless of the merits of the claims themselves, it goes without question that Martin had the burden of establishing by a preponderance of the evidence the costs or damage incurred by them in connection with each item asserted as a claim. Moreover, even assuming that Martin proved Soderhamn had breached its contract in one or more of the respects claimed, Martin had the duty to mitigate its damages (*Enco* v. *Russell*, 210 Or. 324, 339, 311 P.2d 737 (1957). Repeatedly throughout the trial Soderhamn showed that Martin could have mitigated its damages, but instead chose

the most costly way to achieve what it thought it was entitled to.

The evidence produced by Martin at best left the record in a state of confusion and made it virtually impossible in most instances to determine with any degree of accuracy exactly what Martin would be entitled to by way of damages, if any, without indulging in speculation. To establish the amount of its damages Martin relied basically upon records produced from its files and the files of Sutherlin Machine Works. In conjunction with these records it attempted to utilize the testimony of three witnesses, Mr. Carl Halverson (of Sutherlin Machine Works), Mr. Kemp and Mr. Ray Martin.

Mr. Halverson relied upon documents marked as Ex. 921A through 921N and Ex. 931 to support the charges he had made to Martin for work done at their plant. He testified that Ex. 921A through 921N covered all work and material done for Martin (Tr. 384). The most that Mr. Halverson could say was that the documents he was referring to and relying upon as a basis for his testimony were records and summaries of records from his company covering charges made to Martin for work done on their barker and chipper installation (Tr. 353). He did not personally prepare the records produced, nor is there any evidence they were prepared under his supervision. He did not know the details of the claims being asserted against Soderhamn and obviously could not say whether the charges made to Martin should or should not be considered a part of their claims (Tr. 353-55). He had no independent knowledge of charges made for work done other than that contained in the exhibit he was referring to (Tr. 354).

Mr. Ray Martin, willing to testify on anything whether he had personal knowledge or not, relied upon documents contained in Exhibit 929. Exhibit 929 is a box containing files and folders separated into categories or classifications. The exhibit was offered and received (Tr. 665-669). There is considerable conflict in the testimony as to what Exhibit 929 is supposed to contain. Mr. Martin said Ex. 929 was not entirely business records (Tr. 1164). He had no knowledge of the facts contained in the exhibit (Tr. 893-894). He did not know how it was put together, who put it together, or what it contained (Tr. 1204). The exhibit was first introduced when Mr. Kemp was on the stand (Tr. 665). He did not know what was in the file and had only examined it briefly before trial (Tr. 665, 667). The exhibit contained records with notations made for purposes of trial, presumably by Mr. Kemp. Mr. Martin did not know what the notations meant (Tr. 1203). His testimony, insofar as it was based on Ex. 929, is the subject of a separate Specification of Error (*infra*, 91).

Faced with confusion and conflicts in connection with the exhibits, as well as the oral testimony relied upon to establish defendant's damages, it was impossible to ascertain with any degree of accuracy what defendant's claims were, let alone what defendant was entitled to, if anything.

The preliminary negotiations leading up to the actual contract were handled by Mr. Kemp (Ex. 904, p. 8). He was Martin's expert in the field of mill construction; he had previously negotiated for the same installation for Martin with Sumner Iron Works and Nicholson Manufacturing Co. (Tr. 696; Ex. 904, pp. 49-51). He inspected other similar installations

constructed by McManama to familiarize himself with the type of job he could expect.

The overall program for the construction of the installation was discussed, negotiated and crystalized in conferences between Mr. Kemp, McManama, and a representative of Soderhamn, before submission of the final proposal to the Martin family for approval. A formal contract was proposed, approved by Kemp and then submitted to the Martin family and their attorney. It was ultimately executed. Its terms demonstrate that the Martins were relying on Mr. Kemp to see that he got what he bargained for. Mr. Kemp was designated in the contract as the owner's representative (Ex. 100, p. 2). In the addendum to the contract of August 11 it was specifically spelled out that Mr. Kemp, as the owner's representative, "shall be deemed as between owner and contractor to have authority to determine for owner any changes to be made in work or design during the time the installation is in progress, to accept changes for *work or equipment not covered* by the contract and to agree to any delays which may be necessary * * *." (Emphasis supplied) (Ex. 100, p. 34)

Within a short time after the contract was signed, Mr. Ray Martin demanded Soderhamn supply a performance bond at a cost of some $800. Soderhamn basically is only engaged in the manufacture and sale of wood processing equipment, such as barkers and chippers, and is not in the contracting business. McManama, on the other hand, is a contractor, and Martin knew this. The Martin people had reservations as to McManama's financial status and insisted that Soderhamn assume the responsibility as the prime contractor. Martin had investigated Soderhamn and had satisfied itself as to its financial responsibility

(Tr. 1062). Notwithstanding this fact and the fact that no provision was made in the contract for a performance bond, Mr. Martin demanded one (Tr. 1063-65).

When Soderhamn acceded to Mr. Ray Martin's request but suggested that the cost of the bond should be for Martin's account (Ex. 416), Mr. Martin took offense and arbitrarily rejected the suggestion (Ex. 422). This is a small matter and under ordinary circumstances would not warrant attention. In retrospect, however, it graphically demonstrates the attitude which Mr. Martin was taking and, as it later developed, would continue to take in connection with this contract. It demonstrates the atmosphere in which Soderhamn was forced to operate throughout the performance of this contract.

At the outset the relationship of Solderhamn and McManama with Mr. Kemp was one of accord. Mr. Kemp, after substantial work had been done on the contract, volunteered the statement that the cooperation which he was receiving from Soderhamn and its subcontractor, McManama, and the work they were doing were excellent (Ex. 532). It is true that there were some minor differences of opinion, but in view of the magnitude of the construction job this was to be expected. Mr. Kemp had basically negotiated the contract and appeared to understand its terms. From time to time he was provided with detailed drawings of the various segments of the installation, as the same were developed, for approval or rejection. In most instances he approved them without change, but in many instances he exercised his authority under the contract to require changes or modifications in the proposed installation. Where the changes went

beyond the terms of the contract, he approved change orders to reflect the increase or decrease in cost.

One of the first changes in the contract was the substitution of an oil hydraulic system for air. This change is outlined in a letter from Soderhamn to Mr. Kemp, dated November 14, 1961 (Ex. 471). This change is significant in view of the position taken by Mr. Martin at the trial. At that time he contended that it was understood from the beginning that hydraulic power was to be used instead of air. When Mr. Martin was questioned on this at the trial, he stated that a Soderhamn representative brought a copy of the proposed contract to Oakland on July 19, 1961, and at that time certain changes were agreed upon, one of which was the substitution of hydraulic power for air, and subsequently the contract was amended to incorporate such change and resubmitted for approval by Martins on July 21, 1961. Discussing the changes made between the July 19th draft and the final draft of July 21, Mr. Martin's testimony on this point was as follows:

"Q. Now you say that in the revision between 19th and the 21st that the power system was changed from air to hydraulic.

A. Yes, sir.

Q. You couldn't be in error on that, could you, Mr. Martin?

A. It was discussed in the July 13th meeting, and during the meeting Mr. McManama made the statement that the—

Q. Now, my question, Mr. Martin, was not about the 13th.

A. Well—

Q. My question was this. Are you certain that a revision was made between the 19th and the

21st to change from air to hydraulic? That is my question. Now, either 'yes' or 'no.'

A. Yes.

Q. That was made.

A. Yes." (Tr. 1054-55).

This testimony is in direct conflict with the documentary evidence consisting of letters from Soderhamn to Martin dated September 19, 1961 (Ex. 430), October 5, 1961 (Ex. 447A), and November 14, 1961 (Ex. 471), the sole subject of which was the proposed change from air to hydraulic.

The contract provided that payments would be made by Martin as the work progressed. Martin was authorized to retain 15% of the total amount due on each individual phase or system until its completion and during a 30-day training and break-in period after completion. The first trouble arose upon the completion of Phase III (Sawmill Chipper). The sawmill chipper installation was completed and placed in operation on January 10, 1962, and a 15% retention due on this phase was requested to be paid on February 10, 1962 (Ex. 496). Martin refused to pay, and contended that the chipper did not meet specifications (Exs. 497, 498). Martin persisted in this contention from that date through the trial. In the proposed findings and conclusions the claim was dropped. See 9, 12, *supra.*) In fact the chipper went into operation on January 10, 1962, and operated continuously until the sawmill was destroyed by fire in May, 1963.

In June, 1962, a meeting was held between representatives of Soderhamn and Martin to discuss pending problems in connection with the completion of the project (Ex. 602). At that time 14 separate items or grievances were listed by Martin. The results of this

meeting are outlined in Ex. 602. Subsequently there were numerous meetings and check lists submitted, considered and action taken thereon, as outlined in Exs. 606, 614, 618, 623, 626, 629, 645, 650, 659, 660, 664, 675, 676, 677, 678, 686, 691, 692, 698 and 716. Soderhamn took appropriate action on the checklists (Tr. 1642-1650). At one point in these discussions Soderhamn requested permission to send Mr. Tom Haley, an experienced sawmill engineer of Timbermen's Engineering Co., down to Oakland to inspect Martin's plant and give Soderhamn an independent evaluation of Martin's complaints. This request was refused (Ex. 702, 706). At a later date Soderhamn offered to submit the entire controversy to a team of experts for arbitration (Ex. 698). This request was likewise refused. (Ex. 692 covers the offer to submit to arbitration, and Ex. 698 covers the refusal.) Soderhamn tried in vain to arrange conferences with Martin's personnel in an effort to resolve the controversy (Exs. 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802 and 803).

It became apparent that litigation was the only route that was feasible. The litigation took the shape outlined in the Statement of the Case herein. The trial resulted in Findings of Fact and Conclusions of Law which (except for two minor matters freely conceded by appellant) appellant maintains are clearly erroneous. There is with respect to this aspect to the appeal basically one error: The trial judge failed to find the facts and law in accord with the evidence. Therefore, appellant has organized its argument in the order of the Findings of Fact as they appear in the record (R. 86-93). Because the Conclusions of Law were simply statements of the amount of damages defendant was entitled to recover as a result of each Finding of Fact,

reference is parenthetically made after each finding subheading to the Conclusion of Law which follows therefrom and which is also erroneous.

The Challenged Findings

Finding of Fact 1. Barker Foundation Structure, R. 86 (Conclusion of Law 3, R. 94, line 14).

The trial court awarded defendant $11,609.73 on its claim that the welding on the barker foundation structure was insufficient. To support this claim Martin relied primarily upon the fact that it employed the Sutherlin Machine Company to add additional welding, bracing and gusseting. It was admitted that, although Soderhamn's subcontractor had completed its job in September, 1962, no complaint was made about the welding until after this suit was brought in April, 1963 (Tr. 98, 154, Ex. 904, pp. 82, 83). This last fact is particularly significant when it is considered that during this time three separate checklists were authored by Martin setting forth the things they felt had to be completed before Soderhamn's responsibility under the contract would be finished (Ex. 602, 650, 675, 678, 686). Soderhamn had taken action on each check list. Martin's Mr. Kemp admitted that the few breaks that were found before McManama left the job were brought to the attention of McManama's foreman, and they were rewelded before he left (Ex. 904, p. 82). It is not uncommon to get breaks all the time around a sawmill (Ex. 905, p. 55, Tr. 494). Martin's master mechanic said they were still occurring a year after Sutherlin's work (Ex. 905, p. 55) (although Mr. Kemp swore in a deposition (Ex. 904, p. 88) that since Sutherlin finished there had been no more broken welds.)

The reason Martin gave for needing the additional welding seemed to be the matter of sway. Mr. Hill, an Oregon registered engineer, said at the trial (Tr. 1651) that in his professional opinion the vibration was not excessive or unusual (Tr. 1652). The experts expected to find movement in a steel structure. McManama, who had experience in five states in installing these types of device, stated that it was not excessive and added that he had suggested use of wood piling instead of steel because it made a more resilient structure (Tr. 1319). This had been rejected by Martin in favor of the steel for insurance reasons. Mr. McManama said the vibration did not cause problems (Tr. 1389). Mr. Tozier (who did the survey for Sutherlin) would not say that the vibration or sway caused electrical relays to go out, as contended by Martin (Tr. 337). Ray Martin, although quite willing to support the contention, admitted that he did not know anything about the broken welds (Tr. 1141) or welding (Tr. 1139) or engineering (Tr. 1180-81). Of course, he thought the movement excessive, but he admitted to being an office man and not a welder or an engineer (Tr. 849). McManama's supervisor, Mr. Morrison, stated that he saw no broken welds when he left the job in the fall of 1962 (Ex. 902, p. 25), and he didn't think it swayed too much (Ex. 902, p. 24). Mr. Tozier, of the Sutherlin Machine Company, said that he found no broken welds under the barker (Tr. 278-279). He did find places where there was no welding. Two registered engineers stated that they were unable to tell from the testimony of Halverson, Kemp and Tozier, and the other evidence, what was found or where it was found, so that no one could tell whether or not the work done by Sutherlin Machine Company had any beneficial effect on the structure (Tr. 1687, 1769-1770), but in their best judgment,

from what they saw and heard, they were of the opinion that the gussets put on by Sutherlin were not necessary (Tr. 1679, 1761-65).

Mr. McManama, after hearing all the evidence produced by Martin on this topic, stated it made no sense. He did not question that there were places where there was no welding (Tr. 1493). He made an interesting comparison to the frame of an automobile which has many "open seams"—which are supposed to be that way to give the frame the flexibility it needs to stay together under the stress and strain of the swaying body and other parts of the vehicle (Tr. 1494). Mr. Kintz, a registered engineer, said the gusseting was not necessary and was improperly installed (Tr. 1760, 1761). Some of the work he saw that was done by Sutherlin he unqualifiedly stated was a waste of money (Tr. 1765).

Mr. Wahl, of the Timbermen's Engineering Company, a registered engineer, said that the gussets, especially underneath the barker, were not necessary (Tr. 1679) and that if any bracing were necessary it could have been done more economically (Tr. 1682). His inspection of the structure showed that there was too much welding (Tr. 1684), and it was impossible for him to tell where Sutherlin applied their additional welding so that he could form an opinion as to whether or not it made the structure any stronger (Tr. 1686-87). He further stated that he could not tell from the testimony whether or not the movement involved would require any additional bracing (Tr. 1687, 1720). Having observed the work done by Sutherlin, he questioned whether any of it was necessary, stating that the structure is supposed to be elastic, citing the example of the Empire State Building (Tr. 1714). Mr. Delahaye, a practical welder, said

that in his opinion the Sutherlin welding was not necessary (Tr. 1614).

What occurred was that Mr. Kemp turned the Sutherlin Machine Company loose underneath the barker with full assurance that the bill would go to Soderhamn. They did so without giving Soderhamn any notice whatsoever of their intention (Ex. 904, p. 83). And they did so without any computation of what was needed (Tr. 405), or without any competitive bids or other outside analysis.

It seems fruitless to complain that the price was unreasonable when it is Soderhamn's position that the work was unnecessary. Martin did not sustain its burden to show that this work was reasonably necessary. It is certainly clear that the evidence amassed against this claim was unrebutted. It is also clear that Martin made no effort to mitigate its damages.

This claim is for $11,609.73. In support defendant relied on Exhibit 921 A, a group of invoices issued by Sutherlin to Martin, presumably for work done in welding and bracing the barker structure. Exhibit 921 A consists of 13 separate invoices. Mr. Halverson detailed work done on the barker structure (Tr. 364-366) and testified that his charges for such work were covered in Exhibit 921 A.

Invoice D1141 is a part of 921 A; it is for $3,084.32. The invoice contains the following:

"Repairs to Barker

Labor & balance of material this invoice
installed ¾" Plate shears on log dump
Installed bark shears & guards around Barker
Reinforced framework under sawing deck
Installed ¾ & ½" plate on block dump
Changed shaft & moved plate on block dump

Changed shaft & moved motor drive on Sinker Deck

Replaced expandex metal w/dia. plate on floor over hyd pumps.

Constructed windows around Barker operator"

It is obvious that the items covered by the above invoice have nothing to do with the welding and bracing of the barker substructure as testified to and contended for by defendant and its witnesses.

The items referred to as "Installed ¾ plate shears on log dump" and "Installed ¾ & ½" plate on block dump" would appear to refer to the "sheer aprons" referred to in defendant's contention numbered 4 in the Pretrial Order (R. 14) and Finding of Fact 4. If it means anything, it must represent a duplicate charge. It is significant that Mr. Halverson gave no testimony on this point. The only testimony on the cost of replacing the sheer plate was by Mr. Martin, and he was only reading from a file in his hand which he knew nothing about (Tr. 906).

The item "Installed bark shears & guards around Barker" would appear to be "shrouding on Barker Structure," defendant's contention 6-A in the Pretrial Order (R. 15) and Finding of Fact 6. It must also represent a duplicate charge. The item shown as "Reinforced framework under sawing deck" obviously refers to work done on the saw deck substructure which would appear also to be a duplicate of the costs defendant refers to under contention 6-A. It is to be noted that a part of the cost covered by invoice D1141 also covers "Replaced expandex metal w/dia. plate on floor over hyd. pump." "Expandex" was part of the steel deck flooring, not part of the foundation structure.

The item referred to in the invoice as "Changed shaft & moved motor drive on Sinker Deck" is the same work that Mr. Martin said was covered by Sutherlin invoice #1254 (Tr. 920) and is part of contention 6-C in the Pretrial Order (R. 16). It is interesting to note that Mr. Halverson testified (Tr. 348) that invoice #1254 (Ex. 921 J) covered work done on the log outfeed conveyor to speed up movement of logs. At no point did defendant assert any claim for reimbursement for this work. This merely demonstrates some of the confusion in the record on the matter of damages.

It is obvious that a substantial part of the sum of $3,084.32 represented by invoice #D1141 is not properly chargeable to repair of the barker substructure as testified to by Mr. Halverson and Mr. Martin. The record will not be cleared by merely eliminating this invoice or deducting the amount represented by the invoice, for there is nothing in the record to segregate the billing from the balance of the charges reflected in Exhibit 921 A and charged against the barker substructure. Exhibit 921 A contains 13 separate invoices. Most of them merely refer to "Welding and Bracing" on barker; no details are supplied. How much of the "Welding and Bracing" was connected with the replacement of the expandex, installation of sheer plates, or relocation of the sinker deck motor is purely a matter of speculation.

Soderhamn found itself in a frustrating position of being told in effect, "We don't like your installation, but we won't tell you what is wrong with it. We plan on correcting it, and when we get done we will send you the bill." Not until Martin filed its answers to interrogatories submitted during the course of pretrial discovery was Soderhamn advised what most of

Martin's specific complaints about the installation were. It was only then that Soderhamn learned that Mr. Martin had authorized Mr. Kemp to hand Sutherlin Machine Works a "blank check" to completely revamp the installation.

In sum: After the barker foundation structure was completed, after Soderhamn had undertaken to correct deficiencies claimed by defendant, and after Soderhamn's contractor had departed, the defendant undertook substantially to reconstruct the barker foundation structure. It did not request or demand that Soderhamn do the work. Instead it sought another party, allowed that party solely to determine the work to be done without any check or challenge and ordered the work to be done. It then sought to charge the cost back to plaintiff, and the trial court allowed it, even though (a) the record does not permit a finding of what work was actually done, or where it was done; (b) there is no convincing evidence that what Sutherlin did was necessary or even proper; (c) there is substantial evidence to the contrary; (d) the evidence of cost is confusing and, insofar at least as invoices 1141 and 1254 are concerned, is irrelevant, immaterial and, therefore, improper; (e) Martin made no effort to mitigate its damages; and (f) the finding and conclusion are purely speculative and unsupported by the record.

Finding of Fact 2. Log Haul, R. 87 (Conclusion of Law 3, R. 94, line 16).

For corrective work on the log haul, defendant was allowed $2,969.03. For proof that the log haul did not comply with specifications, Martin relied on its summary which indicates they had some difficulty with it from the last of June to early October, 1962,

when a revision by Sutherlin "solved the problem" (Tr. 438, 648, Ex. 924-B). Initially, Martin complained the log haul was underpowered. However, no change was ever made in the power unit (which had been furnished by Martin), because the motor installed was found to be sufficient after the mechanism had a chance to be broken in (Tr. 1378, 1502), as McManama had advised.

Before McManama left the job, his superintendent, Howard Delahaye, had the log haul operating satisfactorily, having solved the initial problems by installing additional shrouding to keep the bark from fouling the chain (Tr. 1381, 1599). He received no further complaints (Tr. 1381). Delahaye also made a modification of the chain returns which were initially undersized (Tr. 1510, 1574). These returns were originally installed at Mr. Kemp's request and differed from McManama's plans (Tr. 1380). Mr. Delahaye (McManama's supervisor after Morrison left) testified that the log haul worked well when he left the job (Tr. 1576), as did Mr. McManama (Tr. 1428).

Exhibit 320 is a picture of the log haul as it was prior to June 20, 1962 (Tr. 1786). Exhibit 340 shows the revision accomplished by Sutherlin by October, 1962 (Tr. 1795). Exhibit 377 is a 1964 view of the same structure (Tr. 1800). Basically, all Sutherlin did was to relocate the spocket (Tr. 243-44). When Sutherlin was called in, Mr. Kemp was against the system he had initially approved (Ex. 209, 210, 211, 222 and 223). The fact that Sutherlin made a change in the drive system from the original system to an S-drive is no evidence that the drive as initially installed did not meet the specifications of the contract. All it proved was that Martin was not satisfied with it. Whether or not the amount of time spent in revis-

ing this portion of the structure was reasonable is a question that is immaterial until it is first decided whether the haul as established by McManama failed to meet the contract specification. Martin introduced no such evidence, and therefore it did not meet its burden with respect to this claim.

Included in this claim is work done by Martin's personnel on June 29, 1962, and July 7, 1962. McManama's crew did not leave the job until September 21, 1962 (Tr. 1524). If Martin's personnel did any work on the installation, it would have had to have been at McManama's request and not authorized by Soderhamn.

Mr. Halverson, when discussing the work done on the log haul section by Sutherlin, testified that he worked on the "skimmer conveyor" under the log haul (Tr. 411). This is a conveyor installed by McManama under direct purchase order from Martin and was not part of Soderhamn's contract. (See *infra*, 48) If corrective work was needed on this installation, it cannot be charged to Soderhamn. The only charges made by Sutherlin in connection with the log haul section is covered by Ex. 921 E, and this must include charges in connection with the "skimmer conveyor." How much of the charge was for that work would again be purely a matter of speculation.

Findings of Fact 3 A, B, C. Kickers, Kicker Shafts & Kicker Arms, R. 87 (Conclusion of Law 3, R. 94, line 17).

For claimed deficiencies in the kickers, kicker shafts and kicker arms on the barker outfeed the trial court allowed defendant $5,480.38. Mr. Kemp approved the detailed plans for this construction on October 12, 1961. He made additional specifications on

the original drawings (Ex. 206, 207, 208, 307, 334). Mr. Tozier admitted that there was no problem with the shafting until after it had been operating for a considerable length of time (Tr. 210, 266). The first complaint to Soderhamn was December 17, 1962 (Ex. 718). As far as the arms are concerned, Mr. Kemp approved mild steel, and it was initially installed by McManama in order that the shafting and bearings not be damaged by inexperienced operators (Tr. 1396). The kicker arms were considered expendable (Tr. 1452-54). The contract (Ex. 100, p. 26) provides in connection with the kicker arms:

> "Kickers to be fabricated of *structural steel* and mounted on 4-7/16 shafting carried in cast iron dolly boxes and powered by 12" air cylinders, Atlas, Cunningham, or equal." (Emphasis supplied)

That structural steel as specified in the contract is mild steel of the type installed is confirmed by Halverson of Sutherlin Machine Works (Tr. 367).

In the original installation of these kicker arms, practically any system could have been built. There was no contention that the kicker installation did not conform to the specifications of the contract. The $5,000 rebuilding job should not have been charged to Soderhamn in face of the fact that the system as built was approved by Martin's representative prior to its installation and was built as approved.

Martin's case on this point never attempted to show that the Sutherlin revision bore any relation to the criteria of the approved plan. Its case proceeded on a theory that it was entitled to build, at Soderhamn's cost, any system it could devise. There is no rule of law that permits such a measure of damage,

even if we were to assume for argument that McManama's (and hence Soderhamn's) responsibility went beyond building that which was specified in the plans and specifications approved by Martin. It is obvious that the drawings became contractual terms when they were approved by Soderhamn and Martin, and this is certainly the practical interpretation followed by the parties. *Lease* v. *Corvallis Sand & Gravel Co.*, 185 F.2d 570 (9th Cir. 1951).

Martin relied on eight Sutherlin invoices totaling $5,392.25 in support of the major portion of this claim (Ex. 928-B, p. 2). Mr. Halverson at no time testified as to the amount of charges, if any, his company (Sutherlin) billed for work in this area. He testified the charges his company made for work done for Martin was covered in Ex. 921A through Ex. 921N. The invoices referred to in defendant's Ex. 928-B, p. 2, which was rejected (Tr. 670), are not included in these exhibits. Mr. Martin at no time testified as to the cost, if any, incurred in connection with fixing the kickers or kicker arms (Tr. 898-899), nor did he make any reference to the invoices. He only referred to "folder 3 ABCD" of Exhibit 929, which contains no Sutherlin invoices on this point. Mr. Martin did, however, make reference to time cards relied upon to support work done in this area by his personnel. The time cards reflected work done in May, June and July, 1962 (Tr. 1157), which was while McManama was still on the job.

In sum: There is no evidence that Soderhamn failed to perform its contract in this regard. To be sure, Soderhamn did exactly what the contract called for. Martin asked and allowed Sutherlin substantially to rework the installation (after it had been in use for quite some time) in accordance with its newly

developed ideas which were quite different from the contract requirements. The record does not contain evidence either that the work was necessary to complete the contract or, for that matter, evidence of what the work cost was as to the major part of the claimed damage.

Finding of Fact 3D. Transfer Deck (R. 88) and Finding of Fact 17. Walkways & Stairways (R. 93) (Conclusion of Law 4 (R. 94-95)).

Conclusion of Law 4 includes damages resulting from Findings of Fact 3D and 17, in the total amount of $6,464. In this part of the argument the two findings are treated together.

This might be called "the all-steel contention." It is certain that Martin decided upon an all steel structure. It is equally certain that it so decided after the contract was executed. After the contract was signed, Martin decided to change the wood frame of the chipper building to steel (Tr. 725) and to change the barker building from wood to steel (Tr. 1364). It also changed the wooden decks to steel after wood had been installed on the transfer deck (Tr. 1279). On November 28, 1961, Mr. Kemp insisted that four-inch *wooden* plank be put on the deck rather than three inch and so marked the plan (Ex. 217). If Martin, prior to the signing of the contract on July 21, 1961, (Ex. 100) decided upon an all-steel installation, as it now contends, it apparently failed to inform Mr. Kemp, as well as Soderhamn and McManama.

Martin considers its "all-steel contention" a question of construction of the contract. There was no *ambiguity* in the contract. The matter of the materials to be used for walkways and deckings simply is not mentioned. That wood was within the contemplation

of the parties is amply evidenced by the fact that Mr. Kemp approved four-inch wood decking as late as November 28, 1961. When wood was approved (Ex. 217), it became a matter of contract and any change would require consideration. Martin elected prior to the execution of the contract to use steel piling rather than wood piling. (See Statement of the Case, p. 3, *supra.*) But this adds nothing to their claim.

Mr. Kemp issued a change order to Soderhamn to substitute steel on the walkways and on the core chipper building and paid a $1,200 difference (Tr. 716). This was later claimed to be a mistake on Kemp's part. This is not the type of an error that could be made if the negotiations, of which Mr. Kemp attended all (Ex. 904, p. 8), were for all-steel structures. Mr. Kemp admitted that he did not understand the contract the same way Ray Martin did (Tr. 722). He later admitted that he did not get the information from the insurance carrier (i.e., that an all steel structure would obtain a better insurance rate) before the contract was signed; hence they had to make the change afterwards (Tr. 726). Mr. Morrison, McManama's first supervisor, stated wood was originally intended (Ex. 902, p. 37).

Before the contract was executed, McManama proposed to install the barker structure on wood piling. Martin switched to steel piling and the contract was amended to provide that the barker assembly "be mounted on steel piling, steel caps and with steel crossbracing" (Ex. 100, p. 27). The original proposed contract price was increased some $26,000 as a result of this change by Martin. At the time of trial Mr. Kemp explained what was meant by steel piling, steel caps and steel crossbracing. He testified that steel pilings were the steel beams which were driven into the

ground to support the structure. The steel caps were steel beams which were set on top of the piling and used to tie the piling together. The steel crossbracing were the beams used to crossbrace the steel piling. No contention could be made that the language "steel piling, steel caps, steel crossbracing" referred to decks or buildings which were to be constructed on top of the steel piling and crossbeams. Yet at the time of trial Mr. Martin contended that at the time they changed from wood piling to steel piling prior to the execution of the contract it was understood and agreed that the installation was to be "all steel." (Tr. 856) This change was dictated by reason of "insurance requirements" (Tr. 725-6, 856).

The facts are: After the contract was signed Mr. Kemp signed three separate change orders which had the effect of amending the contract to substitute steel for wood in various parts of the installation. The first of these was change order 7 (Ex. 107), approved by Mr. Kemp on November 10, 1961, pertaining to Phase I (core chipper), which provided in part as follows:

> "Additional cost of *steel building* and *steel flooring* around core chipper." (Emphasis supplied)

The second was change order 11 (Ex. 111), approved by Mr. Kemp on January 8, 1962, pertaining to Phase III (sawmill chipper) and provided as follows, in part:

> "Additional cost for *steel frame chipper building* structure and *steel deck*." (Emphasis supplied)

The third change order was 17 (Ex. 117), approved by Mr. Kemp on May 10, 1962, pertaining to Phase II (barker building), which provided in part as follows:

"Steel debarker building in lieu of metal clad wood frame for contract."

Mr. Ray Martin personally initialed and approved change orders numbered 7 and 17, after they had been approved by Mr. Kemp.

McManama submitted to Mr. Kemp a detailed drawing reflecting the layout of the log transfer deck (Ex. 217). The drawing reflected the deck would be made of 3″ wood planking. Mr. Kemp, after noting on the drawing that the 3″ *wood planking* should be changed to 4″ *wood planking*, approved the drawing on January 28, 1962.

Mr. Kemp, when questioned concerning the reason for the change from wood to steel as provided for in change orders 7, 11 and 17 mentioned above, stated that it was due to "insurance requirements." When asked when the question of insurance requirements arose, Mr. Kemp admitted that it was after the contract was signed. His testimony on this point is as follows:

"Q. Now why—there was a change from wood frame steel clad so far as the barker building was concerned and the core chipper building was concerned and that was done after the contract was signed; is that correct?

A. (Mr. Kemp) Yes, sir.

Q. And why was that done?

A. That was done after—we did not hear from our insurance broker, who is located in Chicago.

Q. I see.

A. And when we got our information from our insurance broker relative to insurance costs, naturally it was changed so we could enjoy the

minimum cost on insurance for the same.

Q. But the idea of the requirements of the insurance company was a matter that came up after the contract was signed and you then changed—.

A. It was in the mill, but we did not receive the answer by the time that the contract was signed.

Q. So then you amended the contract to satisfy your insurance people?

A. Correct, sir." (Tr. 725-6).

In face of the foregoing documentary evidence and positive testimony of Mr. Kemp, Mr. Ray Martin took the position at the time of trial that the original contract provided for an "all-steel" installation. He took the position that Kemp in approving the change orders referred to above had made a mistake; in other words, he had improperly interpreted the contract. When questioned as to his explanation as to why he personally approved two of the change orders previously approved by Mr. Kemp, he attempted to explain it by saying that he had done so on instructions of his father to avoid embarrassing Mr. Kemp. The extent to which Mr. Ray Martin was willing to go in his role as an advocate to sustain his initial position on this issue is demonstrated by his testimony on cross-examination (Tr. 1069-1080). In reluctantly admitting that his initial story that he personally signed the change orders to avoid embarrassing Mr. Kemp was in error, he testified as follows:

"Q. Isn't it a fact, Mr. Martin, that the question of wood versus steel did not come up at all until sometime in the early part of '62 in connection with the barker construction?

A. This may very possibly be the case, sir. I know that these conversations did take place rel-

ative to the steel versus wood, and the dates it appears I'm confused on.

Q. Isn't it a fact that you actually approved the Change Order No. 7 not for the purpose of, you might say, covering up Kemp's mistake but before this discussion between yourself and your father ever occurred?

A. That would appear to be the case, yes, sir.

Q. And isn't it a fact that at that time no question had arose about wood versus steel and that you were in accord with Mr. Kemp, and the change order was appropriate to cover the difference between the cost of substituting steel for wood?

A. Well, sir, as of that time, I think that I would have to say yes, that I — that this matter hadn't come to my — that I was in error on the 26th when I initialled that, and that these discussions took place after the 28th of November. But they did take place.

Q. I see. But at the time that you signed on November 10th, 1961, and November 28th, 1961, you were of the opinion that change orders covering the difference in cost of wood and steel were appropriate?

A. The error hadn't come to my mind as of that time, sir." (Tr. 1080, 81).

It is evident from the testimony of both Mr. Kemp and Mr. Ray Martin that at the outset neither one understood or interpreted the contract to require "all steel." Like the performance bond, which Mr. Ray Martin admitted was not called for by the contract (Tr. 1065), the steel was something he wanted, although it admittedly was not called for by the contract. This is not just a matter of Mr. Martin's cred-

ibility as a witness. The fact is that his direct testimony was directly contradicted by all the evidence.

Finding of Fact 3E. Pits, R. 88 (Conclusion of Law 2, R. 93, line 31).

For pits built under the hog and surge bin and feeder plaintiff was awarded $1,833.10, even though they were not contemplated by the parties prior to the execution of the agreement and, of course, are nowhere mentioned in the contract. The need for these pits was created by the movement by Martin (subsequent to the execution of the contract) of the location of the hog. Mr. McManama testified (Tr. 1285) that Mr. Kemp moved the location away from the cleat building. He stated that the structure initially was to be installed immediately adjacent to the side of the cleat building, but Kemp moved it 16 to 20 feet toward the pond (Tr. 1290). Exhibits 316, 317, 318, 322 and 354 show the barker structure and its relation to the cleat building. Mr. McManama further testified (Tr. 1286) that Martin made a fill in the mill pond after the contract was signed and that the reason for the necessity of these pits was the fill (Ex. 595). The steel box pit was required because the machines that were placed in them had to be lowered (Tr. 1287). It was contemplated that these machines would have been above the pond water line. The basic drawing in existence prior to the signing of the contract (Ex. 122) supports this. It shows these items right next to the cleat building. In Tr. 1290-91, Mr. McManama explained how the hog was moved for insurance reasons, or to make clearance so that fork lifts could travel adjacent to the cleat building. The matter of moving this structure and the lowering of the Jeffrey hog arises again in this brief when we get

into the contentions concerning the hog conveyor (see *infra*, p. 73). All of that difficulty resulted from this move (Tr. 1458-59).

The pits involved in this finding were not required under the original plans and the contract. They were necessitated by changes made solely by and at the direction of Martin. The expense was charged to Martin as additional work not within the contract. Despite the facts, indeed without regard to the facts, the trial court charged this expense back to Soderhamn. Here, as so frequently elsewhere in the case, the finding and conclusion are nothing less than a rewriting of the contract to impose on Soderhamn an agreement it never made.

Finding of Fact 4. Sheer Aprons, R. 88 (Conclusion of Law 3, R. 94, line 18).

Martin claimed and was awarded $2,758.16 for installation of sheer aprons or plating on guides to take logs into the mill pond from the barker outfeed conveyor. Exhibits 300, 301, 321, 334, 336, 363 and 399A show the area of the debarker upon which these sheer aprons were installed. The contract and Exhibit 122 showed no such installation. The specifications for this particular portion of the transfer deck are contained in Exhibit 200, which was approved by Kemp on November 28, 1961, and Exhibit 201A, approved by Kemp on September 22, 1961. The skids, as shown in the drawing (Ex. 122), would only have been "knees" or I-beams without cover. After Martin decided there should be plating, McManama had suggested ¾" plate for the sheer aprons and the decking and had made his bid on that basis. Mr. Kemp decided not to spend that much money on the plating, and *Mr. Kemp* therefore determined that ¼" would

be adequate (Tr. 1462). Later on, Mr. Tozier of Sutherlin, in his revamping of the system, decided that the ¼″ originally purchased by Mr. Kemp was too light and he put on ¾″ plus an 8″ I-beam to tie up the several knees (Tr. 213). Tozier says the beams that were installed were all right, but the ¼″ plate was loose at the weld and was torn (Tr. 274). Mr. Martin thought the original ¼″ plating came as a gift from McManama and Company, a gift prompted by the fact that McManama, according to Martin, thought something should be put on there (Tr. 905). This was not the fact at all, as illustrated by the Martin purchase order (Tr. 1461). Mr. McManama testified: "This ¼″ plate was applied as a part of the Martin's direct purchase order to us, and it was not applied to prevent logs from damaging the components which you mention below but merely to join the fabricated steel knees which extend out from the outfeed conveyor itself" (Tr. 1461-62). Mr. McManama went on to explain that he had bid on heavier material (and had predicted that ¼″ plate would fail) but Mr. Kemp had rejected the suggestion. When asked about this transaction at the trial, Ray Martin said he was not aware that Mr. McManama had recommended to Mr. Kemp that heavier steel be put on the transfer deck or had quoted a price initially of some $6,800 to do the work (Tr. 1172).

It would appear, therefore, that the original contract called for only the knees to be installed (Ex. 122), or that upon approving the plan (Ex. 201) Mr. Kemp set the specification. That the knees as installed were in conformity with that drawing was not questioned. In fact, McManama at his own expense went beyond that specification and established other knees. Martin contracted with McManama to cover the knees

with the ¼″ plating (notwithstanding McManama's recommendation that ¾″ should be used). It is completely beyond reason that Martin should now recover damages from Soderhamn because the plating which they had ordered from McManama to cover these knees broke up under the pounding of the logs.

The evidence of damages on this claim is also confusing. Mr. Halverson, when testifying as to what his company did and what his charges were, made no reference to any invoices covering this work, and none are a part of Exhibit 921A through 921N, which Mr. Halverson identified as covering his work. Invoice D1141, which is a part of Exhibit 921A (see *supra*, p. 30), covers work done in installing sheer plates on the log dump and block dump but does not contain a breakdown. Ex. 921B contains reference to "Replacing Saw Deck Plates" (Invoice D1508). Again one is left to speculate as to what, if anything, was expended on this item.

Finding of Fact 5. Barker Refuse Conveyors, R. 89 (Conclusion of Law 2, R. 94, line 7)

This finding and the allowance of $4,736.96 can fairly be called fantastic. Cursory examination of the contract (Ex. 100) shows that it provides for three bark conveyors in the log barker system. At page 27 the contract describes these:

> "8. Bark conveyors: No. 1 Bark Conveyor to receive bark from the 60″ barker and transfer it to No. 2 bark conveyor, *as shown*, to be carried to the adjacent surge bin at the edge of the pond. No. 3 bark conveyor to pick up sawdust from under the gang chain saw operation and transfer it into this above conveyor, as shown. (Emphasis added.)

"These three conveyors to be constructed of 3/16 formed troughs with 12 ga. AR liner and return trough. Chain to be ¾ x 6 long link with Skookum type flights, approximately 5′ o.c. Drives to be 5 h.p., 7-12 h.p. and 3 h.p., respectively,

* * *"

The only drawing that was in existence at the time that the contract was signed as Exhibit 122. Therefore, the reference "*as shown*" appearing in the first sentence above quoted must, of necessity, have referred to that drawing. That drawing clearly shows three bark conveyors and their length is thereon stated. Viewing the upper right quadrant of the exhibit, a reference is found to a barker conveyor 30' long being placed under the debarker. Under the saws the notation is for a 53′ conveyor. The third conveyor, running at right angles to these first two, at approximately the center of the upper right quadrant, is marked "Bark and sawdust conveyor, 80′ long." The bark conveyor receiving the bark from the 60″ barker was termed the No. 1 barker in the contract (Ex. 100, p. 27). The bark conveyor picking up the sawdust from under the gang chain saws was designated the No. 3 bark conveyor (Ex. 100, p. 27). The No. 1 and the No. 3 conveyors were to empty into the No. 2 conveyor which ran at right angles to No. 1 and No. 3. It was termed the No. 2 conveyor (Ex. 100, p. 27).

What Martin was permitted to recover was $4,-736.96 for building three *additional* conveyors, one a 55′ conveyor that cost $1,980.30, and another a 51′-6″ conveyor that cost $2,360 (Tr. 1274-75). The third was a conveyor built by Martin (Tr. 660). That there was no misunderstanding about the number of conveyors to be provided under the contract is clear from the testimony of Mr. Hill, who stated without

qualification that they were not included in the contract or the drawing (Tr. 1648). Mr. Kemp admitted that that was true (Ex. 904, p. 106). In his deposition he also admitted (Ex. 904, p. 109) that the conveyors called for by the contract were installed, as well as other items not specifically included in the contract. McManama testified (Tr. 1288, 1292): "There are only three conveyors involved in the project." At this point he also described the difficulty that he encountered as a result of Martin's moving the barker structure away from the cleat building (Tr. 1290). This has previously been alluded to (supra, 44), and it will be covered in detail in discussing Finding of Fact 10, concerning the conveyor to the hog (*infra*, 73). It is obvious that there are no other bark conveyors shown or referred to in the contract (Tr. 1298).

Most of the work was done by McManama under direct purchase order from Martin. Here again Martin includes work done by its personnel and in support thereof uses time cards covering work done in December, 1961, and May, 1962 (Tr. 1183), long before McManama left the job, or, for that matter, long before the conveyors were installed. Mr. Martin testified that it was necessary to install additional conveyors to pick up bark and other refuse developed at the barker installation in order to keep it from filling up the log pond. His testimony was as follows:

> "Now this area in depth was from 8 to 18 feet, and I would say probably a good average of 12 feet deep, and it's filled solid. And it was filled solid before we could get a conveyor or an addition from this point to down—" (Tr. 909).

He went on to testify (Tr. 909-11) that these additional conveyors were installed by McManama on a purchase order from Martin to correct this situation.

The facts are it was physically impossible for the log pond referred to by Mr. Martin to have been filled up with bark and other refuse developed by the berker operation for the simple reason that the barker refuse conveyor which he referred to was installed by McManama in May, 1962 (Ex. 925, p. 2) and the barker installation did not go into operation until June 28, 1962 (Ex. 924 B).

The parties contracted for specific conveyors, of specific lengths, in specific places at a specific cost. The work was done in absolute conformity with the contract, except for a change necessitated by Martin (see infra 73). But Martin determined that more or larger conveyors were needed. It ordered them and got them. It is incredible that Soderhamn should be required to pay Martin for failure to perform something it never contracted to do. Again the court rewrote the contract to accord with Martin's afterthoughts.

Finding of Fact 6A. Shrouding, R. 89 (Conclusion of Law 3, R. 94, line 19).

(NOTE: The Conclusion of Law included an award for this finding as well as for Finding of Fact 6B, a total of $9,312.72, of which $1,917.06 was with respect to this finding.)

There is no doubt that the contract does not state how much shrouding should be applied to catch sawdust from the saws. Further, there were no approved plans showing shrouding. There is no question that the witness Tozier (of Sutherlin) was of the opinion that the shrouding provided was insufficient. Needless to say, Mr. Kemp and Mr. Martin shared his view. This claim may be called the "all bark and all

sawdust" claim. It is Martin's contention that 100% of all bark and sawdust created in this wood processing should find its way into the recovery conveyor (Tr. 1397). Actually Kemp wanted 110% (Tr. 1464). Mr. McManama explained that 90% recovery is considered good and the cost of the last 10% is fantastic (Tr. 1465). Mr. Delahaye had never seen any plant where 100% recovery was had. Neither had anybody else, except Mr. Kemp.

Mr. McManama testified that the amount of shrouding installed was that normally installed and was equal to that of the installations shown to Martin's representative prior to the execution of the contract (Tr. 1462-63, 1585). In fact, they installed more than at the Feather River and the Tahoe plants (Tr. 1397). At one point in the negotiations, Mr. Kemp stated that the additional shrouding they required would cost $125 (Tr. 1649, Ex. 686, item 13, Ex. 901, p. 93). Soderhamn offered to credit Martin with $150 after this statement was made, and that was refused (Ex. 901, p. 93).

In support of this claim Martin relied on the invoices of the Sutherlin Machine Company, No. 1508 and No. 1669, which form a part of its Exhibit 921B. Reference to these invoices will show that invoice 1508 included replacing the saw deck plates as well as hoppers under saws. If it is assumed that the hoppers under the saws and the shrouding claimed for are the same, certainly replacement of the saw deck is not a proper part of a claim for shrouding. The evidence was that Mr. Kemp had removed some of the "expandex" plate (which he had had installed by special purchase order to McManama), but defendant has abandoned its original claim that this cost is chargeable to Soderhamn. It should not be awarded

sub silentia anything for "expandex." As far as invoice 1669 is concerned, the work described there has to do with the conveyor hopper under the saw deck. There is nothing to indicate whether this is one of the conveyors that Martin had constructed by Sutherlin or was one of the conveyors installed pursuant to the contract.

There was confusion among the Martin personnel at the trial as to which invoices applied to which claims, if any. The result was a kind of shotgun approach in an effort to prove costs, which left the effect of the evidence to speculation. This claim is a prime example.

Finding of Fact 6B. Log Lifts, R. 89 (Conclusion of Law 3, R. 94, line 19).

This finding concerns log lifts on the barker structure. The award was for $7,395.66. The support for the contention lies in Sutherlin's invoices contained in Exhibit 921C and part of 921B. A cursory view of these invoices will show that they include completing the conveyors (B1144-A-2) and reinforcing the structure under the saw deck (D1144-B-1). The probabilities are that these have nothing to do with the log lifts, since in no sense is a log lift a conveyor under the saw deck. The invoice D-1323 has to do with reinforcing the saw deck frame and D-1680 is simply marked "gussets." The need for and reasonableness of this reinforcing work was thoroughly covered in the discussion of the Finding of Fact 1, concerning the welding of the barker structure. The registered engineers thoroughly discounted the need or necessity or the advisability of this additional work.

Defendant's evidence includes invoice D1877,

which covered "Patching Holes in Saw Deck & Sawdust Conveyor." There is no evidence of any holes in the saw deck or conveyor due to any fault or omission of Soderhamn. The steel saw deck was installed of ¼" steel on direct purchase order from Mr. Kemp to McManama. The exhibit also includes invoice D1144-A-2, which covers "Materials delivered to site to complete conveyor under saw deck." There is no evidence as to any defect in any conveyor constructed by Soderhamn under its contract. Martin constructed an additional conveyor under the saw deck (Tr. 1186). One can only speculate as to which conveyor this invoice refers to.

As far as the log lifts are concerned, it appears that the contract provided that each saw (there were four) should have one set of log lifts, a set being four individual pins (Tr. 1198-1201, Ex. 100, p. 11): "With each saw will be furnished one complete set of 25,000 lb. capacity cradle type log lifts, ..." Ray Martin testified that by mutual assent the cradle type was subsequently change dto the pin type (Tr. 1199). He testified that McManama did in fact install the four sets.

Mr. Wahl said four log lifts for four saws is adequate (Tr. 1727). He had seen many installations where that was all that was used (Tr. 1729). Mr. Martin had complained that when a log was lifted by the pin, sometimes in cutting through the end section of the log the end would tip down and break off some good material at the point of the cut being made, and hence he concluded he needed another log lift to hold up the end. Mr. McManama had explained that it wasn't necessary. McManama said the control of the lift allowed the lift to be stopped at any point before full extension of the pin, so that the end of the log

could be supported on the deck while the section next adjacent was cut, thus preventing the breaking. This is done in many of the mills, as Mr. Wahl testified (Tr. 1729). In any event, if Martin wanted the extra set, it was not contracted for and hence it had no right to recover the same from Soderhamn in this action.

Finding of Fact 6C. Sinker Deck Drive, R. 89 (Conclusion of Law 3, R. 94, line 21).

This $56 item is worth attention because it is a typical example of the way defendant read the contract. Exhibit 323 shows where this motor was initially installed. Exhibit 353 shows it as revised. The revision accomplished the desire of Martin not to have this drive unit exposed as much as it was previously. If Mr. Martin or Mr. Kemp had wanted it installed that way in the first place, it would have been. However, even Mr. Martin admitted that the location of the motor on the sinker deck was shown on the drawing which was submitted by McManama to Martin (Tr. 1207). If Mr. Kemp had wanted it done in any other manner, it could have been done so originally. However, Mr. Kemp, on November 28, 1961, approved the location plans submitted to him (Ex. 217, Ex. 904, p. 132). He was right there and watched it installed and made no objection to it (Tr. 700). Exhibits 217 and 218 revealed that the item was built as approved and any change is properly at Martin's expense.

Finding of Fact 6D. Saw Roof, R. 90 (Conclusion of Law 2, R. 93, line 32).

This award for $1,161 is for an elaborate steel shed or building, which was erected by McManama on

direct purchase order from Martin to cover the saws installed at the end of the transfer deck. This structure can be seen in its early skeletal conditions in Exhibit 324 and as completed in Exhibit 354. The contract did not provide for a roof over the saws (Ex. 100). At one time McManama bid to Martin to build a roof over the saw deck. It was not accepted (Ex. 561, 562). His bid was $1,161 and was never authorized or executed. There is absolutely no other evidence in the record about this expense. The claim was wholly unsubstantiated by the evidence and therefore must fail. Even if there had been evidence of the cost of this covering, it is clear that even Mr. Kemp admitted that it was not in the contract (Ex. 904, p. 123). Mr. Kornberg stated that most saws are not covered (Tr. 120).

Defendant recognized that the evidence does not support this finding. At the time of trial it relied upon an invoice from McManama in the sum of $2,475.00 for work done on a direct purchase order from Mr. Kemp plus $59.59 for work done by Martin (Tr. 921). This invoice included a 4′ extension to the saw deck which Mr. Martin attempted to charge to Soderhamn (R. 16, Tr. 921), but which has since been abandoned (See Ex. 561, in which Martin agreed to assume cost of extension (Tr. 1240)). There is nothing in the record, however, to establish what portion of the actual contract price paid McManama or work done by Martin's own personnel was attributable to the 3′ or 4′ extension and which to the roof. Again the evidence is speculative, even if the contract required a saw roof.

Finding of Fact 7. Hydraulic System, R. 90 (Conclusion of Law 3, R. 94, line 23).

For correcting supposed deficiencies in the hydraulic system, defendant was allowed $2,130.76, including $739.53 for lost oil. Irrespective of the merits of this claim, it is interesting to examine some of the evidence upon which defendant relies in support of the amount of this claim. Again the contents of Exhibit 929 were relied upon, including a Mobil Oil Company invoice (No. 161106) for oil, dated "5/2/-62." That date was more than five months before Sutherlin commenced its work in October 1962, and two months before the barker was operative. There is nothing else in the record to substantiate this claim, and it surely cannot be a part of the complaint Sutherlin corrected. Mr. Halverson testified about the defects that he found: "Well, the hydraulic piping was being subjected to an extreme amount of hammer, such as you might hear in water pipes that I imagine everyone has in that type of piping, and it was due primarily to heating condition and the fact that there was no allowance made for expansion of these pipes. And we corrected that by putting in a hose in critical areas that would allow the pipes to expand as the oil temperature rose" (Tr. 369). The Sutherlin Machine Works invoices D 1292 and D 1292-A, dated in October (Ex. 929) are for material and labor in the work: "Furnish & install hyd hose units to stop vibration breakage on pipes on Barker."

Mr. Kornberg admitted that there was some initial difficulty with the hydraulic system (Tr. 114). Mr. McManama testified that the difficulties were corrected while McManama's crew was on the job (Tr. 1391). He stated he received no further com-

plaints. Mr. Delahaye stated that after the first start-up there were some broken lines that he saw and he installed flexible hoses (Tr. 1579). Of course, there was no charge to Martin for this work. If Martin experienced trouble after McManama's withdrawal, it was incumbent upon Martin to call it to the attention of McManama or Soderhamn so effective measures might have been taken by them. No notice of any breach of warranty was given Soderhamn, and since this was not done, it is not a proper countercharge (repealed ORS 75.490, Sales Act). There was no tie-up of the evidence indicating that the work which required correction was caused by contract insufficiency. The basis of Martin's claim seems to be that since there were initial difficulties, it was entitled to repair subsequent difficulties without giving any notice to the contractor of intention to do so. Unless Martin intended initially to absorb the cost, such notice should have been given. In any event, there is no competent evidence that the work done was required because of incomplete installation of the specified work or poor workmanship or materials.

Finding of Fact 8. Debarker, R. 90 (Conclusion of Law 2, R. 93, line 30).

To a substantial degree this finding is at the heart of this lawsuit. It is evident that the trial court, by accepting defendant's proposed finding, adopted a very simple view of a complex issue—and without a serious review of the evidence. The finding is, first, that Soderhamn contracted to furnish and install a barker. Of that there can be absolutely no doubt, but the finding is that Soderhamn *failed to do so.* That is plainly, simply and absolutely false. The third element of the finding is that the debarker Soderhamn fur-

nished was "deficient and defective," and the fourth is that Soderhamn removed the barker and failed to supply another. Therefore, it is said, Martin is entitled to receive a credit *of the full price* under the contract of $81,500.

The theory of the finding is that Martin had a legal right to return the installed barker and receive full credit for its price. Whether that is legally correct depends upon a factual analysis which the trial court did not make, but it is critically important to take notice that Martin did *not* ask compensation for damages it might have suffered by reason of supposed defects. It asked for its money back, without any allowance for use of the machine for a period of 13 months.

Without any doubt at all the barker machine (pictured in Ex. 302) gave trouble to both Soderhamn and Martin. Soderhamn had never built a 60″ machine before (Tr. 77), and the Portland fabricator had difficulty keeping production on schedule (Ex. 437, 455). It was installed on June 28, 1962. Thereafter in attempted operation there were numerous difficulties relating to the hydraulic system in the barker, the electrical system, and necessary adjustments to the machine. Martin detailed its "down time" in Exhibit 924-B (which also includes problems not related to the barker machine (Tr. 1227)). In every instance Soderhamn undertook and made the necessary repairs and adjustments. Still and all the barker was working, by Martin's own figures, 69% of the time (Tr. 1226-27).

While all these problems considerably acerbated the relationship between the parties, they were not the ones claimed to give Martin the right to return

the machine. Beginning February 13, 1963, the barker ring bearing "froze." Between that date and May 17, 1963, there followed a series of repairs, replacements and failures until there had been a total of six bearing failures. The barking operation entailed conveying a log through a ring which carried numerous blades under tension. The ring rotated rapidly, and the knives pressed against the logs, cutting away the bark. The ring rode on 124 ball bearings mounted in a round cage consisting of four heavy wire races (see "Figure 1, T.R. Miles," in the drawings made by witnesses). The races were the parts that failed in service. On May 23, the barker was put back in operation after Soderhamn repaired it following the sixth failure. Martin said then that if the bearing failed again it would return the machine (Exs. 772, 776). There was no bearing trouble for more than two months, during which time the machine operated almost continuously.

On August 6, 1963, Kemp shut the barker down for the last time after finding metal shavings in the oil and hearing a "growling" noise. Martin demanded a new bearing assembly (Ex. 779), but not being satisfied with Soderhamn's reply (Ex. 780) notified Soderhamn to "pick up your barker" (Ex. 781). About November 17, Soderhamn took the barker away pursuant to a stipulation (Pretrial Order, § II. 9, R. 10) that the removal was "without prejudice to the rights and contentions to the parties in this action." (The stipulation was omitted from defendant's proposed Findings of Fact and Conclusions of Law, R. 86, line 20, which omission was objected to by plaintiff, R. 57, lines 5-8.) The barker was reconditioned and resold for $46,827.76 (R. 11); as reconditioned it incorporated larger rotor bearing races of the same design

(Tr. 76), which had become available for the first time after the sixth failure (Tr. 82) and had been offered to Martin at no cost (Tr. 1822-23). The only major difference in the new races was a reduced need for adjustment (Tr. 1822-24).

The crucial issue is whether there was in fact a seventh bearing unit failure. The sole evidence, with one exception, of a seventh bearing failure lies in the testimony of Mr. Kemp and his help that the machine was making a noise and that there were some metal filings found in the oil on the date of the alleged seventh failure. Mr. Kemp admitted that the rotor could be moved by hand after they had shut it down (Ex. 904, p. 97). When the barker was examined by Soderhamn's people after its return, they could find nothing wrong with it, and, especially, no source for metal filings (Tr. 170).

The other evidence offered was the testimony of Martin's expert, Mr. Czyzewski, who had made a metallurgical study of the six bearing assembly and the seventh (Ex. 922). But the most he could say, after an exhaustive study, was there was "an incipient break down . . ., that . . . could have operated for some time . . ." (Tr. 573).

Czyzewski's opinion was thoroughly discredited by Harold Belanger (Tr. 763-844). Mr. Belanger, whose business is bearings, unqualifiedly stated that there was no failure of the bearing (Tr. 767-781, 805, 841). He completely discounted Czyzewski's contention that the brown spots on the cages were an indication of failure. He termed them "Brinnelling" or "fretting corrosion" (Tr. 768). He stated that these brown spots occur only when the bearing is stationary (Tr. 773), and that the dents shown in the metallurgist's

photographs were not caused while the bearing was in operation (Tr. 774). He stated that the corrosion occurred after the machine was shut down (Tr. 778). (NOTE: Mr. Czyzewski did not know the barker had been stationary for four months before his study (Tr. 583-585). He said (Tr. 591-592) the corrosion was consistent with vibration of a stationary machine). Berlanger positively stated that the bearing was an over-design with ample safety factors for the application (Tr. 780). He stated that a crack in the race was not a fatigue crack but was caused by oscillation (Tr. 785). There was nothing on the bearings or the races which would indicate that any material had flaked off, so that the metal allegedly found in the oil, if there was any, could not have come from the bearing or the race (Tr. 786). It is apparent that a more qualified engineer than Belanger would be difficult to find in the United States. A graduate in mechanical engineering from the College of the City of New York in 1941, he worked for about seven years with New Departure Division of General Motors, the largest manufacturer of all types of power equipment, which of course requires the use of a great number of bearings. Following that he was the general bearing consultant for the Teck Bearing Company of Stratford, Connecticut. Since 1948 he has been a bearing consultant and bearing editor for a magazine called *Power Transmission Design*, of Cleveland, Ohio. He has done consulting work for practically every bearing company in the United States, has written catalogs for New Departure, for Taryington Company, and Minute Position Bearing Company. He has written many articles for *Machine Design* on specific bearing problems. He, of course, belongs to a national engineering society and the American Society of Mechanical Engineers (Tr. 763-65). Not only were Mr.

Belanger's credentials in order, his testimony was convincing—or should have been had the trial court considered it. The same should be said of the consistent testimony of plaintiff's witness Wahl (Tr. 1745-48).

Of major concern is the question of what caused the six failures which undoubtedly did occur. Mr. Belanger, considering all the evidence produced at the trial up to the point of his testimony, and considering the Czyzewski report and the history of the transaction as he detailed in his testimony, advanced two possibilities. One was that the bearing was subjected during shutdown periods to some form of vibration which set up the condition which is known as fretting corrosion. Then subsequent operation of the bearing caused feathering of the edges of the races and eventual deterioration (Tr. 824). He offered as another possibility that when the No. 1 bearing failed, the grooves which support the wires in the ring could have been damaged by the excess heat caused by the failure. He stated that if the rotor rings were not remachined after the first failure occurred (and they were not) and there had been a lot of damage done to them, this could have contributed very strongly to the failures that occurred thereafter (Tr. 826). If we accept the fact established by Mr. Belanger and Mr. Wahl that the seventh bearing installation did not fail in service, failures two, three, four, five and six can be attributed to the fact that the housing of the bearings was damaged during the first failure (Tr. 826). Also there is the possibility that tolerances were not properly maintained and that the lubricating oil was not consistently maintained on the bearing surfaces. Martin's employees contended to the contrary, but no maintenance record or tolerance record was produced by Martin which predated the first failure.

What of the first bearing then? What caused its failure? It should be remembered that the first *bearing* operated for 7½ months before the first failure (Tr. 162). Mr. Belanger's first hypothesis was that fretting corrosion, that is, oxidation caused by vibration, could have been a contributing cause of all of the six failures. That was the opinion of the bearing manufacturers (Ex. 773). It is certain that all bearings eventually wear out. It is also certain that Martin started the barker operation with inexperienced personnel. Neither side to this controversy is able to establish what caused the first bearing failure or the other five. Nonetheless, the engineering experts, Belanger and Wahl, stated the bearing was more than adequate for the purpose intended. There is no evidence that the bearing races were not adequately designed, only that they wore out, the first after 7½ months and the other five one after another. It seems apparent that Mr. Belanger's theory is the most convincing, i.e., that the first wore out in service and when it went it warped the casting, which was not remachined until after other bearings went out. After it was remachined there were no further bearing failures.

This machine cost $81,500. Its resale brought a net return of $46,828.86, which Soderhamn credited to Martin. Martin insists upon its right to credit also for the difference between the $46,828.86 figure and the price it paid of $81,500, or $34,671.14. Its theory is basically that the machine did not do the job because of the bearing failure, i.e., breach of warranty.

The contract for the sale of the barker was made before the adoption of the Uniform Commercial Code in Oregon. The buyer's remedies for breach of warranty are, therefore, controlled by the now repealed

ORS 75.690, which was section 69 of the Uniform Sales Act. That provision gives the buyer an *election* to do any *one* of the following:

A. Keep the unit and recoup his damages when sued for the price by the seller.

B. Accept the unit and sue for damages.

C. Reject the unit (if the property had not passed) and sue for damages.

D. Rescind and recover the price paid.

In pleading Martin took two contradictory positions. It asked for the recovery of the price (or, more accurately, the recovery of the price of another machine) (Pretrial Order § IV, Defendant's Contentions 8 (d), R. 17). It also sought to recover damages by reason of the alleged breach, e.g., lost profits (Pretrial Order § IV, Defendant's Contentions 19, R. 20-21). Although Martin introduced evidence in respect to both contentions at the trial, it apparently recognized that its damage claim was contrary to the Sales Act and it elected, judging by the proposed Findings of Fact and Conclusions of Law, to seek only the recovery of the price, although arguably some of its other contentions (see, e.g., R. 17, lines 11-17, R. 20, lines 20-28) seem to be claims for damages for breach of warranty.

In any event if the first six failures were breaches of warranty which Martin allowed Soderhamn to repair, and if thereafter Martin made use of the machine in its operations, it would seem that the property was deemed by the parties to have passed, according to their intention and because Martin accepted the barker by acting as owner (repealed ORS 75.-480). Martin could only rescind (as it now has chosen

to attempt to do) if its acceptance of the working machine after the sixth failure and repair had been on an assumption that Soderhamn had furnished assurance that the machine then conformed to the contract, and if the machine had thereafter failed. Martin had the burden to show that after its acceptance of the machine there was in fact a subsequent failure. See *Klinge* v. *Farris*, 128 Or. 142, 157, 268 P. 748, 273 P. 954 (1929).

Martin's right to refuse the machine, then, was dependent upon Martin's showing that the seventh bearing failed. The unrebutted evidence of Mr. Belanger and Mr. Wahl was that there was no failure. Mr. Kemp stated that the rotor could be moved by hand when he shut the machine down on its final day of operation (Ex. 904, p. 97). The engineers at Soderhamn had the same experience when it was received in their shop (Tr. 170). Soderhamn called Martin to advise it to make its personnel available to examine the machine because there was no appearance of failure. Martin instead sent Mr. Czyzewski to find a failure.

Martin was bound to retain the machine because they had accepted the previous bearing replacements, unless there was another failure. They continued to operate the machine. How much more was required to accept the machine? The contract did not require Soderhamn to furnish bearings for the machine forever. Conversely, Martin expected them to last longer than the periods of time occurring between the second, third, fourth, fifth and sixth failures. The defective parts were replaced without charge. The remachining apparently had solved the problem (probably created when the first bearing failed after 7½ months of service), considering that the barker operated on a

two shift basis continuously after the sixth replacement (Tr. 1229). Martin was not entitled to return the machine just because a growling was heard. It should be remembered that the new bearing which was operating satisfactorily in Nevada City, Californit, at the time of the trial, was offered to Martin on June 3, 1962, at no charge (Tr. 1822-23). Plaintiff's continued use of this machine precludes recovery on this claim.

At the time of trial defendant took the position it was entitled to damages for what it contended to be a defective barker, based upon what it would cost to purchase a 60″ Nicholson barker (approximately $97,000), less the credit allowed by Soderhamn on the resale. It abandoned this theory in favor of the difference between the purchase price of the Soderhamn barker, $81,500, and the resale credit, as though Soderhamn agreed to sell them a barker for $81,500 but failed to deliver. If in fact Soderhamn had failed to deliver the barker, that would be true. The fallacy of Martin's position is that Soderhamn delivered the barker. In fact, the barker was installed in Martin's plant and placed in operation on June 28, 1962. The barker was used by Martin from that date until August 5, 1963. During a good portion of this period it operated two 10-hour shifts per day. After repair of the sixth failure, the barker operated 971½ hours in production (Tr. 1229). The evidence submitted at the time of trial in support of the claim for "loss of chip revenue," now withdrawn, (Tr. 1021-1026) amply demonstrates the use made by Martin of the machine for over one year and the money made by Martin through its use. There is no rule of law or theory of damages which would sanction a buyer purchasing an $81,500 piece of equipment, using the

equipment in his business for over one year, reaping substantial profits from its use and then saying, "Give me my money back."

If the barker was defective and as a result Martin was entitled to damages, the damages could not exceed the cost of repairing the defect or the cost of the machine less a reasonable allowance for the value of the use made of the machine. There is no evidence to support an allowance of the full price as damages, even assuming it had made such an election.

Finding of Fact 8(a). Barker Removal, R. 90 (Conclusion of Law 5, R. 95, which includes Findings 8(a), (b), (c)).

This finding allows incidental expenses allegedly incurred ($2,666.56), because of the barker bearing difficulties. That this claim is wholly inconsistent with repealed ORS 75.690 and defendant's election has been pointed out under the last part of this argument. Logically, these expenses, even if properly documented and not barred by the statute could be assessed against Soderhamn only if it was proved that they were concurred by reason of contract deficiencies for which Soderhamn was responsible. The only testimony in support of this claim was by Mr. Martin, based on Exhibit 929:

> "Q. Do you have a record, Mr. Martin, of the expense to which the Martin Brothers went in connection with this installation and operation and removal of the roller from the barker structure for repairs?
>
> A. Yes, sir.
>
> Q. I am referring, Mr. Martin, to your Folder No. 8-A.
>
> A. Yes, sir, I have it. 'Debarker Repair.'
>
> Q. Now, does that folder contain the time

cards for labor expended by Martin Bros. in connection with the removal and reinstallation and removal again of the rotor and of the building and the other items that were necessary in connection with the failures of the debarker?

A. Yes, sir.

Q. And what is the total of that down time?

A. 2,000-2,656.56.

Q. Could you state whether that is a reasonable charge for the time and labor involved?

A. Yes, sir." (Tr. 950)

All that folder contains is 27 time cards and two adding machine tapes. Exhibit 931, about which Mr. Martin did not testify, contains two invoices (B-818-97, 1899) from Sutherlin for charges in connection with "lifting the barker ring," but there is no testimony tying these invoices to any bearing failure. Mr. Martin had no personal knowledge on the subject (Tr. 1137-39; 1150-56). In this state of the record, there was a simple failure of proof.

Finding of Fact 8(b). Barker Building, R. 91 (Conclusion of Law 5).

Martin was awarded $8,496.82 for rebuilding of the structure to accommodate its new Nicholson 72" barker. Here again the only evidence is Exhibit 929 and the testimony of Mr. Martin. Also, here again, the exhibit (consisting of two folders) contains a pile of time cards, some unexplained invoices and adding machine tapes. Mr. Martin's testimony is unilluminating:

"Q. . . . And was it a big debarker?

A. Yes, sir, it was a 75" barker.

Q. And what did you pay for that?

A. $132,000.

Q. Mr. Martin, in installing—in removing the Soderhamn debarker from the barker structure and in placing another barker on the barker structure, did Martin Bros. necessarily go to some expense in connection with the removal of the building and the reinstalling of the building?

A. Yes, sir.

Q. And how was that expense incurred, if you might tell us?

A. They had to take out—they had to take off the entire roof structure and two complete walls and the part of another wall and then they had to rebuild the building.

Q. Have you before you in Exhibit 929, which contains the details of the amounts expended by the Martin Bros. in connection with that particular item of work?

A. Yes, sir.

Q. Can you state from those records an amount involved in that work?

A. Yes, sir. If you will give me just a second here I'll get these back in order so that we don't mess them up. (pause) The total amount of the barker building in removing the barker building and rebuilding and replacing it was $8,496.82." (Tr. 963-964)

Martin included the cost of constructing or reconstructing a building to house a 72", $132,000 barker it purchased from Nicholson to replace the Soderhamn 60" debarker (Tr. 954, 963). A 60" replacement barker was available from Nicholson (Tr. 960). Martin elected to acquire a 72" machine, which was bigger and heavier than the 60" machine (Tr. 1232). To house the 72" barker it was necessary to increase the size of the barker building (Tr. 1231-32). Even

if Soderhamn is chargeable with the cost of restoring a building over a replacement barker, (which is contrary to the Sales Act) certainly there is no basis for assessing the additional costs that necessarily had to be incurred in constructing a *bigger* building to house a *bigger* barker. No evidence shows how much of the cost was allocable to the larger building. The amount chargeable to Soderhamn is purely speculative. Moreover the whole expense was due to Martin's decision to remove the barker and return it to Soderhamn. If there was in fact no seventh bearing failure, then there was no right to return. Hence, the building need not have been destroyed and rebuilt.

Finding of Fact 8(c). Labor furnished by defendant, R. 91 (Conclusion of Law 5).

Again the only evidence is Mr. Ray Martin's testimony, and as usual he had no personal knowledge of where or when this work was done (Tr. 1216, 1236, 1237). He was relying on time cards covering work done for McManama in May, June and July, 1962 (Tr. 1236-37), before McManama left the project.

It was anticipated by the parties when the contract was executed that Martin's employees would participate in and receive instructions during start-up. Of necessity Martin had to have personnel engaged in connection with the start-up of the barker and other parts of the installation in order to acquaint themselves with the equipment, how to operate it and maintain it. This cannot be a charge against Soderhamn and ought not to have been allowed.

Finding of Fact 9. Console, R. 91 (Conclusion of Law 3, R. 94, line 24).

The trial court awarded $422.90 for expenses in relocating the barker operator's console. At the trial no one would accept responsibility for the original location. Mr. Hill, Soderhamn's engineer, stated that it was not located where he wanted it, but where Mr. Oiler and other employees of Martin insisted:

> "I was at a meeting in Mr. Kemp's office sometime prior to the actual location of the console when we had a discussion and as— . . . . As I recall, we discussed this, not necessarily with Dick but with other people who were in his office at that time, and we made a tentative location on a plan as to where we felt the console should be. This is not where it ended up initially." (Tr. 1636-37)

At this meeting were Ron Oiler (Martin), Ronnie Copeland (Martin), Ellis Duncan of Dixie Controller, George Thoming of Soderhamn, and Dick Kemp (Tr. 1637). At that time an "X" was placed on a drawing indicating where the console was to go.

Mr. Delahaye said there was a conference held on the location, and present were Kemp, Morrison, Delahaye, Oiler, and gentlemen from other concerns (Tr. 1586). He stated that Kemp said "Put it right there," and that is where it went (Tr. 1586). Mr. Delahaye stated that if he had had the say he would have put it on the outfeed instead of the infeed (Tr. 1613). Mr. Kemp admitted at the trial that there was ample discussion of its location prior to the installation (Tr. 677-78). He stated that one of the prints showed it on the opposite side of where it was installed. It is obvious that the console could have been located any-

where he wanted it, and it is also obvious that he had the right and did so direct. While he did not admit it, the evidence is that he did direct its initial installation or at the very least participate in the decision. Therefore, the cost of removing the same would be the responsibility of his employer.

Mr. Morrison of the McManama firm did not like its initial location either (Ex. 902, p. 27). He stated it was put there by mutual agreement. Although he used the term "mutual agreement," he stated that he would not personally have placed it there. He also stated he would not put the finger on anybody, indicating he would not say who spotted the exact location (Ex. 902, p. 27). He did say (Ex. 902, pp. 54-55) that Kemp and Copeland said that the location would be satisfactory. Mr. Oiler, of Martin's staff, quoted Hill as saying that he wanted it in the corner and elevated as it was later changed (Ex. 906, p. 89), but it was not put in that way. He stated that he asked about this location and he was told that it was put where Kemp wanted it. Mr. Kemp's feeble explanation (Ex. 904, p. 99) was that he could not say who designated the location and that he did not know where he wanted it. At page 102 of his deposition (Ex. 904) he said he did not object to the placement.

Again defendant relies on Mr. Martin to support this claim. He did so in the usual manner. He relied on Ex. 929, which had some figures but they did not add up (Tr. 967). There is a reference to the console in Ex. 921G: it covers glass. Invoice D1141, a part of Ex. 921A, refers to "constructed window around barker operator." There is no reference to any change in the location of the console which appears to be the basis of defendant's claim.

No one disagrees the console had to be moved. But

the trial court failed to note the evidence that showed who was responsible for the defect. If Martin's Kemp directed its position, or agreed to it, relocation was not Soderhamn's responsibility.

Finding of Fact 10. Conveyor to Hog, R. 91 (Conclusion of Law 3, R. 94, line 25).

Previous reference has been made to the barker refuse conveyor system and to the fact that additional discussion would be had concerning conveyor No. 2, which was the conveyor to the hog (supra, 45). This was the conveyor that ran at right angles to the bark conveyor (No. 1) which ran under the barker and the saw conveyor (No. 3) which ran under the cut-off saws (Ex. 122). The complaint was that the conveyor to carry bark and sawdust to the hog installed by McManama was not capable of sustained, successful operation. The contract for this No. 2 bark conveyor was for an 80′ conveyor (Ex. 122, p. 27). The drawings submitted for this conveyor for approval of Martin Bros. (Ex. 271) was for a 67′ conveyor, a "straight shot" conveyor.

Mr. McNamana explained the difficulty he faced. Martin's movement of the Jeffrey hog away from the cleat building accounted for the reduction in length of this conveyor from 80′ to 67′ and required raising the elevation of one end of the conveyor and lowering the other so as to meet conveyor No. 1, conveyor No. 3 and the hog. He was dealing now with the 67′ conveyor and not an 80′ conveyor. He had to be under conveyors Nos. 1 and 3 a sufficient distance to allow bark to drop in, and at the same time he had to be above the hog to allow the bark to drop out and into the hog (Tr. 1399-1400). The problems Martin had with this conveyor were caused by jamming the Jef-

frey hog up against the barker structure. If this change had not been made in the first place, there would not have been any trouble. Martin did not consult with McManama or Soderhamn before making the change.

Exhibits 306, 307 and 308 show this conveyor as initially installed. Exhibit 309 shows the Jeffrey hog. Exhibit 313 shows the lack of success of one of the revisions Sutherlin attempted in 1963 (Tr. 1790). Exhibit 310 is a similar illustration of this, and Exhibits 311 and 312 also show hang-ups with the Sutherlin revision (Tr. 1791). Exhibit 332 shows the road, as does Exhibit 336. Where the flat bed truck is located on the road (Ex. 332, 336) is the area where the 13 feet were taken from the length of this original conveyor. The hang-up Martin complained of, at the point where the third bark conveyor emptied into the second bark conveyor, was also caused by the same factor; namely, change in elevation. There would have been no hang-up if adequate drop could have been established below the end of the third conveyor.

Exhibit 122, the drawing in existence at the time the contract was signed, shows that the pond was immediately adjacent to this cleat building prior to the fill being completed. It also shows that the hog was to have been located within 16′ of the closest adjacent line of the cleat building. Exhibit 333 shows the original installation (Tr. 1792). Exhibit 348 shows the revised hog conveyor, and Exhibit 349 shows the debris accumulated under the revised system. See also Exhibits 343 and 344 (Tr. 796). Exhibit 352 shows the roll-back experienced by the Sutherlin system, and Exhibit 350 shows the method of feeding the bark to the belt which was Sutherlin's second system. Exhibit 345 shows a hang-up in the system as modified

in mid-1963 (Tr. 1797). Exhibit 347 shows how the hog had to be located right behind the saws. Compare this to Exhibit 122, which shows the hog considerably behind the location of the saws. Exhibit 351 shows the hog conveyor and Exhibit 365 shows the belt to the hog.

It is obvious that the trial and erorr system followed by Mr. Kemp and Sutherlin in their attempts to rectify some of the problems with the McManama installation was extremely costly and unreasonable. Its unreasonableness was testified to by Mr. Kintz who said a $3,000 to $5,000 cost would have been enough to do what Sutherlin did (Tr. 1778). Another witness, Mr. Wahl, was of the opinion that a conveyor such as was created by Sutherlin could be done for $5,970 (Tr. 1688). It was apparent in the testimony that the cost of conveyors of this type is in the area of $36.00 to $46.00 per foot (Tr. 1299-1303). This is the price that McManama charged Soderhamn for the first three conveyors and the price McManama charged Martin for the two additional conveyors it purchased (Tr. 1274).

Arthur Kintz, an engineer, whose business it is to compute the cost of and build this type of apparatus, said the costs submitted by Martin in this matter were entirely unreasonable (Tr. 1765-66). He was aware that they did their work on the weekends and at night, and said they were still unreasonable (Tr. 1777). He stated the costs under the usual conditions were $3,000 to $5,000 (Tr. 1778). The other engineer, Wahl, stated that the costs submitted by Martin were not reasonable and should have been in the area of $6,000. He said the original system as designed (i.e., with a spring tightener) was a satisfactory design

(Tr. 1688). He also pointed out that his $6,000 figure was for a new 85′ conveyor (Tr. 1725). In stating that the cost was excessive, Mr. Wahl took into consideration the time the work had to be done, considering overtime, and he felt that $6,000 would be more than adequate (Tr. 1726-27).

Mr. Tozier, of the Sutherlin Company, stated that when he inspected the operation of McManama's conveyor, after it had been in use for some time, the angle of it was not too steep and that it was not giving roll-back (Tr. 298). He stated also that when Sutherlin cut the McManama conveyor and put in their belt design they had trouble with it (Tr. 299). Actually the exhibits indicate how much trouble they had with their second design. Much of the cost attributed to this claim was for correcting Sutherlin's revisions. All Sutherlin did with respect to the McManama conveyor was to cut one section out and rearrange and change the drive sprockets and the drums and add an S-drive, as opposed to the spring tightener which had been designed, approved and installed (Tr. 297).

One of the excuses offered for having to revise the McManama conveyor was that the chain had broken and had been fed into the hog. While it was admitted by Tozier that there was no damage to the hog (Tr. 295), he stated that it did bend the chain somewhat. The hog was also provided with a metal "trap" to prevent hog damage (Ex. 100, p. 13). Halverson admitted that chains going into the hog are a common sawmill experience (Tr. 418). Halverson, (Sutherlin) who had to redesign his own modification system, stated that he was hampered by the space allotments the same as McManama (Tr. 419). He also had to exceed the recommended conveyor angles (Tr. 418). He also had the same result (Tr. 418-19).

The most that could be wrung out of Mr. Kemp was that the barker was moved 8 inches (Tr. 704). He was quite vague and did not recall moving the hog some 20 feet. He answered in the same manner in which he answered the question about the location of the console (supra, 71-72). His recollection was particularly cloudy in these two areas. He did remember, however, that Sutherlin had trouble with the hog conveyor modification it made (Tr. 739).

It is apparent Martin was responsible for the creation of the situation which made engineering a satisfactory system difficult, if not impossible. Again, the reasons may have been sufficient for changing the location of the structure, but the change was not contemplated by the parties at the time the contract was bid. The evidence does not indicate that the conveyor as built by McManama was not as specified. The evidence is rather that Martin did not like it. After Sutherlin made the revision Martin did not like that, either. Ray Martin finally realized that with the space limitation problem they would have to accept less than a perfect system. The only alternative would have been to move the Jeffrey hog back again toward the cleat building (and thus obstruct the road). Apparently it was easier for Ray Martin to say that the Sutherlin revision was working satisfactorily with just *the normal maintenance* (Tr. 1244) than report to the Board of Directors that they had spent $14,000 on *two* revisions which didn't work.

The evidence on what was done and why in connection with this claim is likewise confusing. The record is clear that Sutherlin modified McManama's original installation. It is also clear that Sutherlin had trouble with its own modification and had to make additional changes. We are left again to speculate

how much is included in Martin's claim on this item for costs incurred in correcting Sutherlin's mistakes, as opposed to correcting McManama's alleged mistake. One thing is certain: it is difficult to believe that Sutherlin could have expended in excess of $14,000 in labor and material to modify a conveyor which at the outside could have been built new at a cost of $3,000 to $6,000. It is even more difficult to believe that Martin would pay such charges without questioning the price. In any event, the evidence is clear that Martin made no effort to mitigate any damage, even though Soderhamn's evidence showed mitigation was possible. *Enco* v. *Russell*, 210 Or. 324, 339, 331 P.2d 373 (1957).

There was no specific evidence to support damages on this item. Martin testified to the cost (Tr. 971). As usual, he was relying on Ex. 929, but that exhibit contained no proper evidence (see 96, infra). Mr. Halverson testified he would have no idea what he charged to modify the hog conveyor without looking at the record (Tr. 412). He had previously testified that Ex. 921F contained his charges on the hog conveyor (Tr. 348). He was in error on this point. Ex. 921F, though labeled "Hog Conveyor," totaled only $1,737.90. It included three invoices D1394, D1432 and D1432A, which on their face appear to cover work done on "Bark refuse conveyor under log haul," a different conveyor.

Finding of Fact 12. Horizontal Chipper Feed System, R. 92 (Conclusion of Law 3, R. 94, line 29).

The horizontal chipper system was on the other side of the sawmill from the units previously discussed. Exhibit 371 shows the "shaker roll" which was a component of the feed system. Exhibit 399-J

shows a similar shaker setup at the Hogan Lumber Company (Tr. 1810). The complaint was that the shaker roll as designed allowed material to fall through which should not have. As Mr. McManama explained, the question was "what materials should drop through and what shouldn't" (Tr. 1368). Mr. McManama had undertaken at his own expense to move the rollers closer together and had built a weighted gate at the junction of the shaker roll and the infeeding conveyor (Tr. 1368). But in the atmosphere of hostility existing at the time that this system was revised, it was deemed to be unsatisfactory also (Tr. 1367-75). This claim by Martin might be called the "all automatic" complaint. It was Kemp's theory that this part of the plant should operate without any human hands. This theory, of course, developed long after the signing of the contract. Testimony of an experienced sawmill man was that a man is expected to oversee these types of operation (Tr. 1481-82). Mr. Kintz, a registered engineer, said this type of operation needs an operator (Tr. 1757-59). Mr. Wahl was of the same opinion. Even Ray Martin admitted a man was to check it from time to time (Tr. 985).

On the question of how much should go through the shaker roll and how much should fall through and be conveyed off to the waste burner, Mr. Wahl stated that when quality chips are sought, sawdust, "pin chips" and "longs" are bad. He says the whole question had to do with money, quality, quantity and cost of design (Tr. 1668). The industry tries to avoid small blocks from going through the chipper because they sliver (Tr. 1671). He also noted that a shaker roll should be capable of getting rid of tramp steel (which would certainly damage the chipper if allowed

to pass over the shaker roll), short blocks and other refuse. He also stated that the longs, if allowed to be made by the chipper (i.e., if small blocks went to the chipper), would foul up the screening process (Tr. 1706) and could plug up the chipper (Tr. 1707). Mr. McManama stated that there were no unresolved complaints made after his crew left the job with respect to this portion of the work (Tr. 1391).

The shaker roll section was to consist of "a motorized shaker roll section to be furnished and installed to receive chippable slabs and edgings from the main sawmill refuse conveyor and transport them onto a chipper infeed belt conveyor. This shaker roll section to consist of heavy steel rolls arranged to agitate the chippable materal passing over it to shake out the sawdust and *small blocks* into existing refuse conveyor below while chippable material passes on into the infeed conveyor belt" (Ex. 100, p. 28, emphasis supplied). Nowhere in the contract is the term "chippable material" defined, but the preceding does state that the purpose of the shaker roll is to shake out the small blocks and sawdust.

It should be noticed that the system as engineered by McManama operated for one year before the fire which destroyed the mill in May, 1963. It should also be noticed that the shaker roll details were reduced to the status of plans and specifications and were approved by Mr. Kemp on December 20, 1961 (Ex. 236). There is no contention that the shaker roll was not built in accordance with the plans and specifications. Furthermore, McManama improved the installation after it was installed (Tr. 1368).

This claim was related to the sawmill chipper for which defendant asked $18,035 (Pretrial Order § IV,

Defendant's Contentions 13, R. 19) for a new chipper and $2,900.05 (Pretrial Order § IV, Defendant's Contentions 12-A, R. 18) for a slasher saw and a conveyor, both of which have been withdrawn since the trial.

The basic problem was the loss of what defendant called "chippable material" at the point where the main sawmill conveyor (a part of the original sawmill installation) joined the shaker roll installed by McManama. The trouble complained of was caused by the fact that the "flights" or metal cleats on the original chain on the sawmill conveyor required a sizable clearance between the head drum of the "old" sawmill conveyor and the shaker roll to permit the "flights" or metal cleats to clear the rolls as the chain turned on its drum (Tr. 1350-1354). After McManama installed his shaker roll and Mr. Kemp complained, he attempted to correct the loss of material, by inserting a "flapper gate," but that resulted in a hang-up (Tr. 1368). The fact remains that the problem was the clearance required by reason of the type of chain used on the old, original, main sawmill conveyor.

What did Sutherlin basically do to correct the situation? It cut the old main sawmill conveyor back some 30 feet (Tr. 680, 977) and substituted a belt conveyor for that portion. The belt conveyor, of course, contained no flights or metal cleats and therefore enabled Sutherlin to place the head of the new belt conveyor up flush to the shaker roll and thereby minimize the loss of any material at this juncture. McManama had previously suggested that the problem could be corrected at this point if Martin was willing to replace its main sawmill conveyor chain with a different type, but Martin refused to assume the cost

(Tr. 1372-73). Soderhamn had no obligation under the contract to install slasher saws, conveyors or other installations beyond the start of the shaker roll. Notwithstanding this, the trial court would charge Soderhamn with the cost of cutting back the old sawmill conveyor 30 feet and replacing it with a belt conveyor in order to satisfy Mr. Kemp's demand for 100% recovery of chippable material without the need of any manpower to supervise the operation. How much of the costs claimed by defendant on this item is attributable to the work done in replacing a portion of the main sawmill conveyor with a belt conveyor is again purely a matter of speculation.

To add to the confusion, Mr. Halverson testified that the work his company did in connection with the modification of this area totaled some $8,887.32 and was set forth in Ex. 921L (Tr. 348). Mr. Halverson's testimony was in error. Three out of the seven invoices included in Ex. 921L by Sutherlin to support costs incurred for modifying the horizontal sawmill chipper are *totally* unrelated to the problem (See invoices D1785, D1871-A, D2135). If Mr. Halverson did not know what he did or where, Mr. Martin certainly did not do much to clarify the matter for the record (Tr. 979-980). There is no question the record is in a state of confusion and placed the court in a position where all it could do was speculate.

Finding of Fact 14. Roof over Belt, R. 92 (Conclusion of Law 2, R. 94, line 2).

This item had to do with a conveyor roof which cost $558.10. Mr. McManama (Ex. 901, pp. 77-78) said this roof was not necessary. Mr. Kemp (Ex. 904, pp. 46-48) said there is nothing in the contract about it, and he did not say anything to McManama about it.

The contract (Ex. 100, p. 29) states that the chip conveyor was to receive the chips from the cyclone and to transport them 80 feet to the 30-unit surge bin. This conveyor was to consist of an 18″ belt carried in troughs and powered by 3 h.p. motors and a shaft reducer. Nothing stated that this conveyor should be airtight, watertight or anything of the kind. The plans for this conveyor were approved by Mr. Kemp on October 18, 1961 (Ex. 248, 249). The plans and specifications as approved do not show any roof. It is therefore submitted that this claim has no basis.

Mr. Halverson testified to the amount of this claim as covered by Ex. 921L. It was all performed on overtime—49½ hours at $7.00 per hour. There is no evidence of any emergency warranting this excessive charge. A most important point on this claim is that Martin never mentioned to Soderhamn or McManama that a roof was wanted or needed. It was not in the contract. Martin simply went ahead in April, 1963, after this lawsuit was instituted (one year and four months after the conveyor went into operation), had the work done and then asked Soderhamn to pay for it. It is hardly reasonable and certainly does not establish any emergency warranting payment of overtime.

Finding of Fact 15. Core-Veneer Blower System, R. 92 (Conclusion of Law 3, R. 94, line 27).

There were three separate pneumatic systems installed under this contract. One conveyed bark from the Jeffrey hog to a fuel disposal plant and another conveyed the chips from the chip screen and control center to railroad cars at a new siding which was completed. Martin conceded that these last two described systems operated satisfactorily. They were built, of

course, by the same people who built the one being complained of: Rader Pneumatics. The system complained of is known as the double injection system designed to convey the chips from the core chipper, which was installed under the contract, and from an existing veneer chipper to the chip control center. The contract unmistakably calls for the installation of a pneumatic system which would so operate as to convey the chips originating at the core chipper and the chips originating at the veneer chipper to the chip control center. The system was engineered and designed by Rader Pneumatics and installed by McManama, both as subcontractors of Soderhamn. The system *as operated* experienced plugging in the line. *But* there was no evidence that the double injection system was troublesome as a result of the installation. Nothing could be further from the truth. It was the position of Mr. Glassy (Tr. 1533-35, 1543, 1567) and the other technicians of the Rader company that the double injection system was capable of, and in fact did, handle the amount of material that it was designed to handle when it was operated properly. The information upon which Rader's people developed their design was given to them by Mr. Kemp. They were skeptical of his figures, and so they overdesigned it (Tr. 1543). It was their position that the trouble that Martin experienced was from overloading the system, not from any problems of design or installation (Tr. 1540-42).

It is apparent that the plugging problem on the blower system was not raised until the lawsuit was filed (Tr. 127-28, Ex. 678, Tr. 170-72). It is also apparent that at the meetings preceding the execution of the contract there were discussions between Mr. Keating of Rader Pneumatics, Mr. Kemp, Mr. Thom-

ing of Soderhamn, and Mr. McManama, wherein the subcontractors were advised of the amount of chips that were expected to be produced at the green end and at the veneer plant (Tr. 1339). Rader was to size this system to the mill according to the log scale production, veneer production and the sawmill production. All of this information was supplied by Mr. Kemp (Tr. 1339). As the system was originally operated, it had difficulty because Martin was storing cores instead of putting them into the system as they developed (Tr. 1365). Mr. Glassy observed this (Tr. 1531). Although Mr. Glassy attempted to correct this situation, which resulted because of the mishandling by Martin's crew, he was faced with the problem of Martin's crew changing the settings that he put on the machinery (Tr. 1537). Eventually he got Martin's Mr. Copeland to supervise this and to keep unauthorized personnel from tampering with it. Mr. Glassy made it very clear that the problems were caused by the overloading by failing to put the cores into the system as they were developed (Tr. 1541). Mr. Glassy stated that the installation exceeded the contract specifications. He said that the proposals he provided in 1963 (Ex. 818) included *increasing the capacity of the system to accommodate a new chipper*, which was to be installed to pick up the roundup (Tr. 1545-6, 1564). Mr. Glassy also stated that it was absolutely indifferent whether they used two pipes or the double injection system (Tr. 1566-67). Mr. Cheek, who made the initial design of this system for Rader (and who designed Martin's 6″ veneer blower which had operated nine years without trouble (Tr. 1863)) stated that the 6″ pipe size was used frequently. He stated that the design of this double injection was to take six units per hour and that Kemp gave him the

data on the material production from which this was developed (Tr. 1867). He said that Kemp was talking about six units in 1961 and ten units in 1963, when Rader was asked for a further proposal which became Ex. 818 (Tr. 1869). He said Kemp told him 24 units per 24 hours from the veneer chipper and 30 units per 24 hours from the core chipper, or a total of 50 units per 24 hours. Cheek said they were skeptical, and so they put in what Kemp said, the 50, and then they designed it for 144. That was their safety factor! The proposal they made, which became Exhibit 818, was not for correcting the 1961 installation but was under new ground rules, he said (Tr. 1873). When asked about the cause of the plugups, Mr. Kemp became reluctant again:

> "Not being an engineer, I am reluctant to answer that question." (Tr. 690).

A little later he said:

> "The Rader Pneumatic people, very good installers, were called in." (Tr. 690).

Mr. Martin acknowledged that Rader was recognized as a leader in the field (Tr. 999).

Martin had accepted this core chipping system, including the pneumatic conveying system from the core chipper, in March, 1962, as Mr. Kemp testified (Tr. 708). He denied designating the location of the blow pipe and the specification on the bends for this system (Tr. 710). He could not recall any discussion of the location of the system with the Rader people before Soderhamn got into the deal. He did say (Tr. 713) that at the start-up he followed Rader's instructions and had no trouble, and that he made no complaint to Soderhamn about its operation until after Soderhamn had filed this lawsuit. Again, he added,

the Rader people were good designers and good engineers (Tr. 714). Mr. Martin, when he testified, stated he did not know what the trouble was, that he did not say the pipe was too small. He also admitted that he had accepted that part of the system (Tr. 869-70).

The evidence introduced by the Martin Bros. in support of this claim is wholly unconvincing. It was fully rebutted. As a matter of law, this claim should not be allowed.

But even assuming defendant was correct in its contention that the pneumatic chip conveying system designed by Rader Pneumatics was defective, it is obvious that the amount paid Archer to install a new system covered a larger system to handle more material. The system installed by Rader was designed and purchased by Martin to handle the chips produced by two chippers, the core chipper supplied by Soderhamn and the veneer chipper which had been in operation for nine years (Tr. 1863). When the Archer proposal was accepted by Martin it had in mind, and did in fact, install a third chipper to handle the "round-up" from the peeler blocks (Tr. 1041, 1100). The installation of a new chipper to make chips out of material that previously had gone into a hog from there to the burner (Tr. 1099-1100) would increase the load on, and requirements for, the chip conveying system. This additional load and requirement was engineered into the Archer system. It can only be speculation what portion of the cost must be allocated to this increased load requirement which did not exist at the time of the Soderhamn contract.

Finding of Fact 16. Brushes, R. 93 (Conclusion of Law 2, R. 94, line 4).

This matter of $941.38 for brushes is silly. The item was not provided for in the contract. This claim belongs in the category of those that were withdrawn, such as the slasher saw.

Finding of Fact 18. Miscellaneous, R. 93 (Conclusion of Law 2, R. 94, line 6).

This finding was all that was finally left of a mass of unrelated odds and ends Martin threw into its contentions. See R. 20. This one should have met the same fate. Soderhamn carried the insurance under this contract until January 19, 1963 (Tr. 1012). The work of installation was completed in September, 1962. The all-risk insurance is a matter Martin has carried since about that time and should have carried from the time McManama completed the project. The barker was in operation and providing substantial profits for Martin. Soderhamn's insurable interest in the machine during this period is as questionable as Martin's attempt to surcharge it with the insurance.

Conclusion of Law 6. R. 95.

The Conclusion of Law necessarily falls if this court sustains this appeal on any one of the foregoing analyses of the findings and conclusions. Moreover, it is erroneous insofar as it includes an allowance of interest. This allowance was carried over to the judgment and is challenged in Specification of Error 4, argued infra, p. 89.

The analysis of any one of the findings by Judge East, taken by itself, should be conclusive that "a

mistake has been committed" (*United States* v. *United States Gypsum Co.*, supra, 15). He simply "failed to make a sound survey of or to accord the proper effect to all the cogent facts" (*Nee* v. *Linwood Securities Co.*, 174 F.2d 434, 435 (8th Cir., 1949). Taken all in all, the result was a judgment based on Conclusions of Law which were in turn based on Findings of Fact which are unsupported in the record and are in many instances purely speculative, particularly as to damages.

SPECIFICATION OF ERROR NO. 4
SUMMARY

The trial court, in entering judgment for the defendant, allowed interest from January 1, 1964 (R. 99). The allowance was erroneous because: 1) controlling Oregon law does not permit interest in the circumstances of this case; 2) there was no demand for interest in defendant's pleadings; and 3) the date of January 1, 1964, has no relationship to any fact or event in this case.

ARGUMENT

Judge East made Conclusion of Law 6 (R. 95) that:

> "Defendant is entitled to judgment against the plaintiff in the sum of $182,112.23, less the unpaid balance on the contract of $61,395.98, or for the net sum of $120,716.25, together with interest thereon from the 1st day of January, 1964, at the rate of 6% per annum, . . ."

This conclusion was in substance made part of the judgment (R. 99):

> "That defendant, . . . , do have judgment for and recover of and from the plaintiff, . . . , the sum of $120,716.25, together with interest thereon from the 1st day of January, 1964, at the rate of 6% per annum, . . ."

Neither in its Answer and Counterclaim (R. 5) nor in its pretrial contentions (R. 13-21) did defendant make a demand for interest. It has long been settled in Oregon that interest on a claim for breach of contract is a matter of damages, for which a demand is necessary. *Ferguson* v. *Reiger*, 43 Or. 505, 512, 73 P 1040 (1903); *Obermeier* v. *Mortgage Company Holland-American*, 123 Or. 469, 481, 259 P. 1064, 260 P. 1099, 262 P. 261 (1927); *Southern Pacific Company* v. *Oregon Growers Co-Operative Association*, 127 Or. 364, 272 P. 281 (1928). Not having been claimed as damages, interest could not properly have been allowed.

Moreover, interest was not allowable, even if demanded. The controlling statute is ORS 82.010(1)(a). Under the statute interest is allowable only on money "due," that is, when there has been a wrongful withholding of money in an amount which is either ascertained or is ascertainable by simple computation or by recognized standards. *Lundgren* v. *Freeman*, 307 F.2d 104, 111 (9th Cir. 1962). Clearly in this case there could have been no wrongful withholding where the amount was in dispute and the defendant himself abandoned some $84,000.00 of his claims after trial. Furthermore, it should go without saying that the amount was not ascertained or ascertainable by simple computation or reference to a standard. See *Lundgren* v. *Freeman*, supra.

Finally, there is nothing in the record of this case,

including the docket entries (R. 109), which can possibly give any significance to the date of January 1, 1964.

The trial court's award of pre-judgment interest was error.

SPECIFICATION OF ERROR 5

SUMMARY

The testimony of Mr. Ray Martin, Martin's general manager (Tr. 845-1255), was directed toward three points in support of defendant's counterclaim: (1) the contents and meaning of the contract; (2) plaintiff's defective or deficient performance; (3) defendant's damages. As to the last, his testimony was based almost entirely on Exhibit 929. The exhibit was not used to refresh recollection; it was claimed to contain the evidence of defendant's damages. The witness admitted that he had no personal knowledge of the facts as to damage other than what was contained in the exhibit. Because the exhibit does not contain the evidence purportedly relied upon, Mr. Martin's testimony had no foundation and ought to have been stricken—or, at least, ignored by the trial judge. The error was prejudicial, because without Mr. Martin's testimony there is no evidence as to many of the elements of damage.

ARGUMENT

Throughout the arguments of Specifications of Error 1, 2 and 3, it was repeatedly pointed out that proof of defendant's alleged damages depended on the testimony of Mr. Ray Martin, defendant's general manager, based on Exhibit 929 (See pp. 21, 30-31, 37,

42, 67-69, 78, supra). The exhibit itself was troublesome. It was offered during the testimony of defendant's Mr. Kemp (Tr. 665), who had identified it as containing "only the work done by Martin Bros. and the materials furnished by Martin Bros." (Tr. 664). Mr. Kemp admitted having no knowledge of the contents other than what he got by examining it at the trial (Tr. 665). He did not put the exhibit together (Tr. 667). Plaintiff's counsel reserved the right to examine the exhibit for relevancy or hearsay (Tr. 668), and it was received subject to that reservation.

Subsequently Mr. Martin was permitted to summarize the contents of the particular folders in the exhibit (over plaintiff's objection that the records would speak for themselves (Tr. 891-892; 1137)), even though Mr. Martin had no knowledge (Tr. 1137-39; 1166) other than what was contained in items in the exhibit (Tr. 894-896; 1204). By the time Mr. Martin had finished testifying even the trial judge recognized that the record was in need of purification (Tr. 1259). The judge also recognized that much of Mr. Martin's testimony (particularly as to costs) was hearsay, but he held it not prejudicial (Tr. 1260). Plaintiff's counsel pointed out that if the exhibit did not contain relevant and admissible evidence of the facts Mr. Martin testified to, then the testimony was without foundation, and it would be prejudicial. This court has pointed out that it cannot be assumed in non-jury cases that the trial judge ignored inadmissible testimony. *Smallfield* v. *Home Insurance Co.*, 244 F.2d 337, 341 (9th Cir. 1957).

Just what Exhibit 929 is supposed to be is very confused in the record. With the exception of groups of orange colored time cards, Mr. Martin admitted that the contents of the exhibit as offered were not

business records of Martin (Tr. 1163-64). The exhibit was prepared specially for the trial (Tr. 1163). There are *copies* of invoices, notes, *copies* of summaries of invoices on Sutherlin letterheads and miscellaneous papers. Many of the invoice copies or summaries contained pencilled notes made by Mr. Kemp for the trial (e.g., see Tr. 1158, 1162-63, 1165). Appendix B to this brief outlines most of the folders in the exhibit. All of the Sutherlin summaries were supposed to have been removed from the exhibit by defendant's counsel (Tr. 1257), but were inadvertently returned (Tr. 1257). The summaries were again ordered removed (Tr. 1257), but they were never removed and are still in the exhibit.

Turning then to the specifics of Mr. Martin's testimony, and taking the items as they came up at the trial, we find the following:

1) $2,963.03 (Finding of Fact 2, R. 87, Ex. 929, folder 2) was for work on the log haul (Tr. 80-89). The folder contains *only* a Sutherlin summary, which is not supposed to be there.

2) $11,609.73, including $28.88 for Martin labor (Finding of Fact 1, R. 86-87, Ex. 929, folder 1) for rewelding and bracing the barker structure (Tr. 892, 895-896). The folder contains only time cards and a Sutherlin summary, which is not supposed to be there.

3) $4,116.00, for steel installed on the transfer deck (Finding of Fact 3-D, R. 88 Ex. 929, folder 3 ABCD) by McManama (Tr. 898-899). The folder contains, *inter alia*, an invoice from McManama & Company for $2,881.20, which bears notes by Kemp and a pencilled figure of $4,116.00, and another McManama invoice (with a different purchase order number) for $1,833.10, also with Kemp notes.

4) $11,429.48 was said to be for steel on the transfer deck (Finding of Fact 3-D), kickers, kicker shafts (Finding of Fact 3, A, B and C) and hog pits (Finding of Fact 3 E, R. 87-88, Ex. 929, folder 3 A-BCD) (Tr. 903). Again the folder contains annotated invoices and Sutherlin summaries. Later the witness segregated, on some unexplained basis, $5,480.38 from the folder as being for Findings of Fact 3A, B and C (Tr. 1027).

5) $2,758.16 for sheer aprons (Finding of Fact 4, R. 88-89, Ex. 929, folder 4) replaced by Sutherlin (Tr. 906). This folder contains *only* two handwritten notes and an adding machine tape.

6) $4,736.96 for additional barker refuse conveyors (Finding of Fact 5, R. 89, Ex. 929, folder 5) claimed under the contract (Tr. 908-911). The folder contains Kemp annotated invoices, some of them representing actual charges by McManama, but the rest are unrelated in their terms to anything.

7) "$4,807.79," said by Mr. Martin (Tr. 913) to be "in the main" for shrouding, was in fact unrelated to any amount in the pretrial contentions in relation to shrouding (R. 15) or Finding of Fact 6-A, R. 89, or any folder in Exhibit 929. Later (Tr. 1028) Mr. Martin extracted $2,195.47 as the amount for shrouding, but gave no explanation.

8) $5,444.34 for additional log lifts supposedly paid to Sutherlin (Finding of Fact 6-B, R. 89). This testimony (Tr. 917-918), too, was unrelated to any specific part of Exhibit 929, except as included in folder "6-D, Part 6A" (Tr. 918), which contains two Sutherlin summaries with Kemp notes, two invoices, some time cards and an adding machine tape. Again the witness later (Tr. 1028) managed somehow to

extract the figure of $9,563.54 for two log lifts. (N.B. The claim for *two* lifts was subsequently abandoned).

9) $2,475.00 for the saw deck roof is again unrelated to any particular folder in Exhibit 929 and bears no relation to anything in Finding of Fact 6-D, R. 90. The testimony was actually referring to a Kemp marked invoice in the folder last referred to, plus time cards (Tr. 921).

10) $2,915.06 for hydraulic system repair (Finding of Fact 7, R. 90, Ex. 929, folder 7) is based on a Sutherlin summary, plus time cards and several invoices which are either indecipherable or are inexplicable without Kemp's notes (Tr. 926-927).

11) $2,666.56 was said to be for "labor . . . and the other items that were necessary in connection with these failures of the debarker" as substantiated by folder 8-A (Tr. 950). (Finding of Fact 8 (a), R. 90-91, Ex. 929, folder 8-A). This folder contains only time cards for approximately 118 hours.

12) $8,496.82 was claimed to be based on "records" in the exhibit detailing expenditures by Martin for tearing down and rebuilding the barker structure for the new Nicholson machine (Finding of Fact 8 (b), R. 91). This item appears to be the total of two folders, both labeled "Part 8 (b)," one called "COST TO REMOVE OLD BARKER" and the other "RECONSTRUCTING BARKER BUILDING." The former has a handwritten note which would indicate Martin paid $500 for removal of the building, and a letter containing third hand hearsay. The latter has time cards, a time summary and odds and ends of invoices, which do not even contain Kemp's notes (Tr. 963-964).

13) $283.00 was said to be Martin's labor cost in

barker start up (Tr. 964). This was said to be based on a folder which must be the one labeled 8 (c). Oddly the folder and the finding (Finding of Fact 8 (c), R. 91) showed different figures from Mr. Martin's testimony.

14) $422.90 was said (Tr. 967) to be the cost of relocating the console (Finding of Fact 9, R. 91, Ex. 929, folder 9). Again, there is a Sutherlin summary, (which, incidentally, has nothing to do with the console relocation), time cards, four identical invoices which bear a figure not apparently related to anything and an adding machine tape. (Martin was not certain about how to interpret the adding machine tapes which he had had made up and which are common to all of the folders of Ex. 929. Tr. 1103, 1110).

15) $14,063.02 was claimed to be the expense of altering the conveyor to the hog (Tr. 971). (Finding of Fact 10, R. 91, Ex. 929, folder 10). With exception of an invoice and a time card, this whole piece of testimony was based on a Sutherlin summary.

16) $12,014.74 was said by Mr. Martin to be shown in Exhibit 929 as the cost of correcting the problems with the horizontal chipper feed system (Finding of Fact 12, R. 92), as well as the now abandoned claim for a slasher saw in the mill (Tr. 979-980). Oddly enough it contains three invoices which are marked by Kemp as applying to the barker. There is one other Kemp marked invoice. But in the main, the exhibit contains time cards (with accompanying calculations) and the ubiquitous Sutherlin summaries. Nothing shows what part of the labor applied to what, although Kemp's notes on the time cards indicate that many of them related to the slasher saw and the "chip loading center," which have nothing to do with this claim.

The foregoing summary touches only on those claims which are still alive and excludes those which Martin has abandoned. The whole point is that Mr. Martin's testimony, insofar as Exhibit 929 is concerned, was based solely and explicitly on the contents of the various folders. In some instances it has been shown that the folders just do not have the data, even if the Sutherlin summaries are recognized. It is clear in the record that those summaries were excluded both by agreement of the parties and by the court's order. But they remain in the exhibit. Nonetheless, they should be excluded as a foundation for Mr. Martin's testimony. Except for the time cards, none of the other items in the folders furnishes any foundation for his testimony. The sum of his testimony was rank hearsay and ought to have been stricken.

To give effect to Mr. Martin's testimony was inherently prejudicial. The only other evidence of damages was by Mr. Halverson of Sutherlin and related *only* to that company's invoices: Exhibits 916, 917, 918, 921-A, 921-B and 931. None of the Sutherlin invoices in those exhibits equal the claimed damages, because in each instance cited above Martin claimed an *additional* amount for labor, materials or the work of others. Moreover, it was shown repeatedly in discussing the evidence adduced in support of defendant's contentions that Mr. Halverson was himself frequently in error as to which Sutherlin invoice applied to which part of defendant's contentions (see, supra, 20). Without Mr. Martin's testimony the proof fails, and with that failure all of the trial court's findings must fall.

CONCLUSION

Each and every one of the trial court's Findings of Fact is clearly erroneous and resulted from the trial judge's failure adequately to review the evidence. Each and every one of the trial court's Conclusions of Law, based as they are on the erroneous findings, must perforce also be held erroneous. A judgment based on those findings and conclusions is necessarily erroneous. The trial court erred in allowing prejudgment interest because it was not demanded, and, moreover, was contrary to controlling Oregon law. Finally, the trial court erred in failing to strike the testimony of Mr. Ray Martin, based on Exhibit 929, because the exhibit was an insufficient foundation for the testimony.

Respectfully submitted,

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By GEORGE M. JOSEPH

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE M. JOSEPH
Attorney

APPENDIX A

TABLE OF EXHIBITS

Number		*Iden.*	*Offered*	*Rec'd*
100	Copy of Proposal & Contract between Soderhamn Machine Mfg. Co., and the Martin Bros., dated 7-21-64, and Amendatory Letter dated 8-11-61	....	46	47
101	Change Order No. 1	....	46	47
102	Change Order No. 2	....	46	47
103	Change Order No. 3	....	46	47
104	Change Order No. 4	....	46	47
105	Change Order No. 5	....	46	47
106	Change Order No. 6	....	46	47
107	Change Order No. 7	....	46	47
108	Change Order No. 8	....	46	47
109	Change Order No. 9	....	46	47
110	Change Order No. 10	....	46	47
111	Change Order No. 11	....	46	47
112	Change Order No. 12	....	46	47
113	Change Order No. 13	....	46	47
114	Change Order No. 14	....	46	47
115	Change Order No. 15	....	46	47
116	Change Order No. 16	....	46	47
117	Change Order No. 17	....	46	47
118	Change Order No. 18	....	46	47
119	Change Order No. 19	....	46	47
120	Cost Report WO 132-02-28, Three pages	....	46	46
121	Soderhamn Invoice #20351	....	46	46
122	Soderhamn Drawing 900-141-W-1	....	46	46
123	TWX Soderhamn to Kemp, 16 November 1961	176	178	179
124	TWX Kornberg to Kemp, 20 November 1961	176	178	179
125	Letter from Thoming to Kemp 21 November 1961	176	....	....
126	TWX Kornberg to Kemp, 21 November 1961	176	....	....

Number		*Iden.*	*Offered*	*Rec'd*
127	TWX Kemp to Kornberg, 22 November 1961	176	....	....
128	Letter from Kornberg to Kemp, 24 November 1961	176	....	....
129	TWX Thoming to Kemp, 27 November 1961	176	....	....
130	TWX Hill to Kemp, 28 November 1961	176	....	....
131	Letter from Kemp to Kornberg, 28 November 1961	176	....	....
132	Letter from Rader Pneumatics to Martin Bros, dated October 16, 1961	....	1831	1832
133	Drawing of Conveyor	....	426	426
134	Letter dated 11-12-64	839	839	839
135	Letter from Rader Pneumatics to Martin Brothers, dated January 15, 1962	....	1831	1832
136 through 216	As listed in pretrial order	....	187	187
217	Drawing #218-II-607, Saw Conveyor System Drive	....	159	160
218 through 399-J	As listed in pretrial order	....	187	187
401 through 601	As listed in pretrial order	....	187	187
602	Letter B, Paul Kornberg to Dick Kemp, dated June 18, 1962	....	134 187	135 187
603 through 677	As listed in pretrial order	....	187	187
678	Letter from Dick Kemp to George Thoming, dated September 5, 1962	....	134 187	135 187
679 through 685	As listed in pretrial order	....	187	187
686	Letter from Soderhamn to F. L. Martin, dated September 24, 1962	....	134 187	135 187

Number		*Iden.*	*Offered*	*Rec'd*
687 through 690	As listed in pretrial order	....	187	187
691	Letter from Dick Kemp to Gust Jacobson, dated October 2, 1962	....	134 187	135 187
692 through 900	As listed in pretrial order	....	187	187
901 through 906	Depositions	....	187 1310	187 1310
907	As listed in pretrial order	....	187	187
908	As listed in pretrial order	....	187	187
909	McManama Deposition Exhibit No. 1	59	187	187
910	McManama Deposition Exhibit No. 2	59	187	187
911 through 913	As listed in pretrial order	....	187	187
914	Survey of Condition Existing & Remedial Work performed to place same in operable condition	....	199 351 359	 362
915	As listed in pretrial order	....	1299	Withdrawn
916	Copies of invoices to Martin Brothers	....	350	353
917	Invoices on Debarking & Chipper System	....	350	....
918	Invoice for Material to the site to Reinforce Structure on Saw Deck	....	350	....
919	Soderhamn Pamphlet No. 1 Containing Proposal to Martin Brothers	....	131	132
920	As listed in pretrial order	....	187	187

Number		*Iden.*	*Offered*	*Rec'd*
921-A through 921-N	As listed in pretrial order	....	350	356
	pretrial order	....	350	356
922	As listed in pretrial order	....	187	187
923-A through 923-C	Films	....	20	20
		....	187	187
924-B	Business Records	....	497	....
924-C	Business Records	....	497	....
925	As listed in pretrial order	....	187	187
928-B	Summary Sheets	....	665	Rej. 670
929	Box of Business Records of Time Cards and Work Records	....	665	669
930	As listed in pretrial order	....	187	187
931	Time Cards & Work Order	357	187	187
Tozier No. 1—Paper signed by Tozier				208
Tozier No. 2—Drawing				247
Tozier No. 3—Records				325
Harry Czyzewski—Drawing				616
All sketches made by any of the witnesses				616

APPENDIX B

Exhibit 929

SUMMARY OF CONTENTS

Folder	Subject	Amount	Contents*
1	Welding	$11,609.73	Time Cards and Summaries
2	Log Haul Drive	2,969.03	Summaries
3 ABCD	Deck and Kickers	11,429.48	Time Cards, Invoices and Summaries
4	Sheer Aprons	2,758.16	Yellow notes and tapes
5	Conveyor	4,736.96	Time Cards and Invoices
"Part 6"	Shorten log conveyor	15.40	Time Cards
6 C	Outfeed	56.00	Summary
6 D, Part 6 A	Saw Deck	12,796.61	Invoices and Summaries
Part 6 B	Log Lift	1,070.82	Time Cards, Time Summary and Invoices
7	Hydraulic System	2,915.06	Time Cards, Summary and Invoices
8 A	Barker Repair	2,666.56	Time Cards
Part A(b)	Removal Barker Building		Nicholson Invoice
Part 8 B	Reconstruction Barker Building	6,196.82	Time Card, Time Summary, Invoices
Part 8 B	Removal Barker	23,000.00	Nicholson Note and Letter
8 (c)	Break In	291.83	Time Cards
9	Console	422.90	Time Cards, Summary and Invoices
10	Conveyor to Hog	14,063.02	Time Cards, Summary and Invoice
Part 12 A, all 12 B	Horizontal Chipper Feed	12,014.74	Summary (Chipper) Summary (Ring Repair), Time Cards and Invoices
Part 12 A	Conveyor Chain Hookup	4.15	Time Cards
Part 12 A	Sawmill Chipper	1,050.00	Notes
14	Chipper Belt Roof	558.10	Summary
15	Blower System	12,397.00	Rader Bid
16	Brushes	941.38	Summary
17	Walks and Stairway	2,348.00	Invoice
18 C	Core Chipper	433.13	Time Cards
18 D	Freight	220.85	Invoices
18 A	Crane Rental	10,837.23	Time Cards
18 B	Steel Bolts, etc.	260.03	Time Cards and unidentifiable matter
18 G	Labor	3,457.17	Time Cards
18 F	Labor	8,646.04	Time Cards

* "Time Cards" are orange colored cards which are records of Martin. "Summaries" refer to copies of summaries of invoices on Sutherlin letterheads. "Invoices" are copies of invoices other than from Sutherlin.